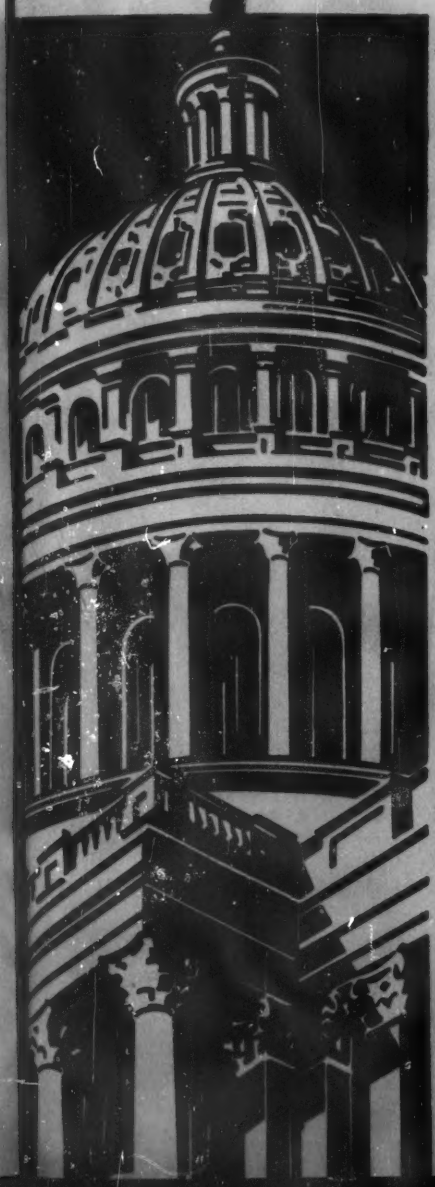
CONGRESSIONAL DIGEST

PRO & CON



December, 1935

Should the Supreme Court's Powers Be Modified?

Genesis of America's Supreme Tribunal

Historic Attacks on Federal Judiciary

Text of Famous Marshall Opinion

The Supreme Court and the New Deal

Bills Now in Congress To Curb Powers

Should Congress Be Empowered to Override Supreme Court Decisions?

Discussed Pro and Con

WASHINGTON, D.C.

FIFTY CENTS A COPY

THE CONGRESSIONAL DIGEST

The Pro and Con Monthly

Not an Official Organ, Not Controlled by Nor Under the Influence of Any Party, Interest, Class or Sect

N. T. N. ROBINSON
Editor and Publisher

A. GRAM ROBINSON
Founder

Volume 14, No. 12 | 2131 LeRoy Place, Washington, D. C. | December, 1935

CONTENTS FOR THIS MONTH

The Question — Should the Powers of the Supreme Court be Modified?

FACT MATERIAL

THE PRO AND CON ARGUMENTS

Entered as Second-Class Matter September 26, 1921, at the Post Office at Washington, D. C., under the Act of March 3, 1879. Additional entry as Second-Class Matter at the Post Office at Baltimore, Maryland, under the Act of March 3, 1879; authorized August 22, 1927. Published every Month, except for July and August. Yearly index to each volume, January to December, furnished on request. Current subscription rates: $5.00 a year, Postpaid in U. S.; in Canada $5.25; foreign rates $5.50; current numbers 50c a copy; back numbers 75c up. Notary fees paid out, on charges over $5.00. Indexed in The Readers' Guide and Other Indexing Publications.

SUBSCRIPTION RATES: 1 yr., $5, 2 yrs., $9, 3 yrs., $12, 2 to 20 subscriptions, $4 ea., 20 or more subscriptions, $3 ea. (To one address.) BULK COPY RATES: Single copy 50c. 10 @ 40c ea. (To one address); 25 @ 35c ea., 50 @ 25c ea., 100 @ 20c ea. (Plus Postage.)

Address all Orders and Correspondence to: THE CONGRESSIONAL DIGEST, 2131 LeRoy Place, Washington, D. C.

The
CONGRESSIONAL
DIGEST MONTHLY

DECEMBER
1935

Should the Powers of the U. S. Supreme Court Be Modified?

Introduction to Study

by N. T. N. Robinson

To those who have not made a study of the history of American politics, the recent efforts in and out of Congress to start a move to curb the powers of the Supreme Court have appeared to indicate a new concept of what the American Federal Government should be if it is to handle successfully the affairs of the nation under modern conditions.

To the student of political history, however, these efforts are merely the 1935 type of the attacks on the Supreme Court which began during Thomas Jefferson's campaign for the Presidency in 1800 and which have come to the fore in connection with political movements from time to time ever since.

Partisan Politics and the Supreme Court

During recent discussion of the powers of the Supreme Court, both proponents and opponents of the proposal that the Constitution be amended to prevent the Court from passing on the constitutionality of Acts of Congress have gone back to the framing of the Constitution and to the political battle that was personalized by the Republican-Democratic Thomas Jefferson on the one side and the Federalist Chief Justice John Marshall on the other.

Beginning with the Constitutional Convention at Philadelphia in 1787, coming to the Jefferson campaign of 1800 and the Embargo Acts of 1812 and then to the Dred Scott decision of 1857, they find that almost invariably attacks on the Supreme Court have followed its decision on a question that was deeply involved in the partisan politics of the period.

Sometimes these attacks have changed from attacks on the Court to attacks on the provision of the Constitution invoked by the Court in declaring void an Act of Congress. In several instances the desired change in the Constitution has been effected by the submission by Congress and the adoption by the necessary three-fourths of the States of a Constitutional Amendment.

The Eleventh Amendment

In one single instance only, however, has the provision of the Constitution affecting the Court itself been adopted, and that was not due to an attack on the Court.

With the exception of the first ten Amendments, known as the Bill of Rights, which were demanded by several States as a condition precedent to their ratification of the Constitution itself, the very first Amendment adopted was the Eleventh Amendment, which changed the Constitutional authority of the Supreme Court by forbidding it or any of the inferior Federal Courts to consider suits by individuals against any of the States.

Thomas Jefferson's Fight on the Federal Courts

Jefferson's fight against the Court, which began before he was elected President, and which continued not only while he was President but for several years after, was unsuccessful. In fact the first member of his own political party he had a chance to appoint to the Supreme Court, Justice Johnson, sitting in Circuit Court, ruled that Jefferson had exceeded his executive authority by violating a Federal statute.

The Dred Scott and Legal Tender Cases

The decision in the Dred Scott case resulted in no action against the Court but in repeated agitation of the slavery question until the feeling between the slavery and anti-slavery States ran so high that the Civil War resulted.

After the Supreme Court decided that the Civil War Legal Tender Acts were unconstitutional, President Grant had Congress pass a bill increasing the membership of the Court from 8 to 9, appointed two judges sympathetic with the Administration i.e., Republican view-

point, brought the Legal Tender Acts before the Court again, with the result that the Court reversed itself and declared them Constitutional.

In modern times one of the most talked-of suggestions for curbing the powers of the Court was for the adoption of an Amendment to the Constitution to permit Congress, by a two-thirds vote of both houses, to reverse a 5 to 4 decision of the Supreme Court declaring an Act of Congress unconstitutional.

The Present Congress and the Supreme Court

The extremists among those who have introduced bills and resolutions in the present Congress, however, would go much further than that. They argue that Congress should be the sole judge of the constitutionality of its own Acts and maintain that since the Constitution did not, in specific terms, give the Supreme Court authority to pass on the constitutionality of Acts of Congress, the Court, in reality, has no such authority but is exercising an invalid authority, due to usurpation by Chief Justice John Marshall and enunciated by him in the famous decision in the case of Marbury v. Madison in 1803.

What will happen to the various pending bills and resolutions on this subject when Congress meets in January is a matter of conjecture, but the indications are that they will die in committee as they have in the past.

Attitude of the Roosevelt Administration

Apparently there is not inherent strength enough in the movement itself to bring them forward for serious consideration, unless President Roosevelt gets back of them. So far he has not done so. If, however, the Supreme Court should declare unconstitutional such major New Deal agencies as the Agricultural Adjustment Act and the Tennessee Valley Authority it might be that the Administration would make an issue of it.

Generally speaking, Administration strategy will be to work for as short a session of Congress as possible and to keep controversial issues in the background on the eve of a Presidential campaign. This strategy would involve heading off a fight on the Supreme Court.

Study Outline

The student would do well to follow those who are giving most serious consideration to the powers of the Supreme Court today and start with the Constitutional Convention.

In ensuing pages he will find the actual text of the Constitutional provisions relating to the judiciary; Chief Justice Hughes' statement of the genesis of the Supreme Court, and in the statements by Representatives Sisson, Ramsay and Lewis and Dr. Beard, in the Pro and Con section on the intent of the Constitutional Convention.

In the history of attacks on the Court he will find the reasons for the early efforts to curb the Court's power.

Since much of the present day argument hinges on Chief Justice Marshall's decision in the case of Marbury v. Madison, the history of that case, with the text of the famous Marshall opinion, is given.

In the article by Mr. Hester will be found an exposition of the Supreme Court's decisions on New Deal legislation.

In the Pro and Con section the student will find not only full discussion of what the Supreme Court was intended to be, but also arguments for and against suggestions that its powers be modified to meet modern conditions.

Principal Arguments For and Against

The main arguments for curbing the powers of the Court are:

1. The framers of the Constitution never intended that the Supreme Court should say whether or not an Act of Congress, duly approved by the President, is Constitutional. If they had so intended they would have written a specific provision to the effect into the Constitution.

2. The only reason the Court now does so is that Chief Justice Marshall assumed the authority and no real effort has ever been made to break down that false theory.

3. As duly elected representatives of the people the Congress is the true instrument of the will of the people and its Acts should not be challenged and set aside by judges who are merely appointees of the President.

4. That all the veto power needed over Acts of Congress is that lodged in the President, who may nullify by veto a Congressional action, unless it be repassed by a two-thirds vote of both houses.

The principal arguments against interference with the powers of the Court are:

1. One of the principal reasons for calling the Constitutional Convention was to curb the actions of the Continental Congress and of the various State Legislatures. The submission of the Constitution to conventions of the people of the States for ratification instead of to the State Legislatures was proof of this intent.

2. In setting up checks and balances among the Legislative, Executive and Judicial branches of the Federal Government the Convention set up the Supreme Court to check both the Congress and the President in case the demands of occasional majorities should override the rights of the minorities, as guaranteed by the Constitution.

3. Marshall did not usurp powers, he only set them forth in language so clear that his opinion has never been successfully controverted. State courts and Federal Courts had passed on the Constitutionality of Acts before Marbury v. Madison without being criticized.

4. History has proven that the rights of citizens, states and minorities are much safer in the hands of the judges of the Supreme Court than they are in the hands of temporary majorities in Congress.

Sample Bills

Classes sitting as Committees of Congress may offer either of the following types of measures:

1. Resolved, That two-thirds of the Senate and House and three-fourths of the States concurring, the Constitution of the United States is hereby amended to provide that Congress shall be the sole judge of the Constitutionality of its own Acts and that the Supreme Court shall not consider cases involving this question.

2. Resolved, etc., that on and after the adoption of this Amendment to the Constitution, any Act of Congress declared unconstitutional by a 5 to 4 decision of the Supreme Court, may be declared Constitutional by its repassage by a two-thirds vote of both branches of Congress.

The Trinity of Federal Powers Created by the U. S. Constitution

As set up by the Constitution, the United States Government is tripartite in form. The three branches are the Legislative, the Executive and the Judicial.

1. The Legislative Branch, the Congress, composed of the Senate and the House of Representatives, writes the laws.

2. The Executive, the President, administers the laws.

3. The Judicial Branch, the Supreme Court and the lower Federal Courts (Circuit and District), interprets the laws.

Provisions for these three branches are contained, respectively, in Articles I, II and III of the Constitution, the initial sections of which follow:

Article I, Section 1. All *legislative Powers* herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. * * *

Article II, Section 1. The *executive Power* shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, * * * together with the Vice-President, chosen for the same Term. * * *

Article III, Section 1. The *Judicial Power* of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

In referring to the unique system of checks and balances created by the Constitution, Dr. W. W. Willoughby, the distinguished historian, in his book, *The Supreme Court of the United States,* says:

"In forming a scheme for central government, our fathers were restrained, not only by the fear lest a national government should be established so strong as to threaten the autonomy of the States, but were fearful lest, like Frankenstein, they should create a being which, when life were once breathed into it, would be beyond their control, and which, though originally with proper powers, would in time, by its own strength, draw to itself increasing powers and become a tyrant. To avert this evil, the members of the convention made the three branches of government co-ordinate in power."

Describing the establishment of the Judicial Branch of the Federal Government, Dr. Willoughby continues:

"The most powerful of these checks in retaining, not only the proper relations between the state and federal power, but between the departments of the Federal Government, has undoubtedly been the Supreme Court. It has been the balance wheel of the republic. The Constitution as supreme over all these powers, has set to them a limit—the Supreme Court, as interpreter of the Constitution, has been the instrument for rendering operative these limitations.

"To render the Supreme Court capable of performing this high function expected of it, it was necessary to endow it with two attributes; first, independence of the legislature; and second, power to hold, in suits between parties, legislative acts unconstitutional, and therefore void. The granting of this power was not left to the mere caprice of its creators, but was forced upon them by the very nature of our government. The establishment of a sovereign legislature is inconsistent with the very aim of federalism, namely, the maintenance of a division of powers between the national and state governments. To have made Congress the authorized interpreter of its own acts, would evidently have left unobstructed the road to rapid absorption of state duties in national governmental activity."

How the Constitution Provides for the Judicial Branch

Following are the provisions of the Constitution creating the Supreme Court, authorizing Congress to establish inferior courts and prescribing the Federal Judicial Powers.

Art. III, Sec. 1, Par. 1.—The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.

Art. III, Sec. 2, Par. 1.—The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—between a State and Citizens of another State;—to Controversies between two or more States;—between Citizens of different States;—between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Art. III, Sec. 2, Par. 2.—In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Excep-

tions, and under such Regulations as the Congress shall make.

Art. III, Sec. 2, Par. 3.—The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Art. III, Sec. 3, Par. 1.—Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of Two Witnesses to the same overt Act, or on Confession in open Court.

Art. III, Sec. 3, Par. 2.—The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attained.

Art. VI, Par. 2.—This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XI.—The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(The Eleventh Amendment was submitted by Congress in 1794 and ratified in 1798 as the result of protests by the states against what they deemed invasion of their sovercign rights by the Federal Government through the consideration in Federal Courts of suits against states.)

First Congress Carries Out Provisions of Constitution in Judiciary Act of 1789

THE first Congress, in pursuance of the legislative power given to constitute a federal judiciary, passed in 1789, what has been known as the Judiciary Act; a piece of legislation, in its perfect adaptation to the political needs, and in its accuracy of expression, second to none in our long list of congressional enactments. The act was drafted by a committee composed of Patterson, Johnson and Ellsworth, but was the work almost entirely of Ellsworth.

The first section of the Judiciary Act reads: "That the Supreme Court of the United States shall consist of one Chief Justice and five Associate Justices." The act further proceeds to establish the inferior courts and to define their fields of jurisdiction as follows: Three grades of federal courts were provided for. The United States was first divided into judicial districts, and to each of these districts was given a district court and a judge, appointed by the President. These courts formed the lowest grade of courts. As provided for in the Act, each State was made a district, as were the Territories of Maine and Kentucky. At present, owing to increased density of population, many of the States are divided into two, and some into three and even four districts.

Last, and highest of the federal courts, is the Supreme Court at Washington, at present consisting of a Chief Justice and eight Associate Justices.

The jurisdictional relations between the different grades of the federal courts is simple. Their jurisdiction is over federal questions, that is over those cases mentioned in the constitution and covered by Acts of Congress in pursuance thereof, to which the judicial power of the United States has been extended. To the circuit courts of appeals come all appeals from the district courts, which is allowed in all cases involving sums of five hundred dollars and over. The Supreme Court is the court of last resort, and to it come appeals from the circuit courts of appeals in cases involving five thousand dollars and over.

In addition to making these regulations concerning appeals from a lower to a higher federal court, the judiciary act gives to the Supreme Court the revision of certain classes of cases decided in the highest state courts. The twenty-fifth section of the act provides that this may be done in the following three classes of cases:

"First, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity. Second, where is drawn in question the validity of a statute of, or an authority exercised under the laws of a State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity. Third, where any right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up, or claimed by either party under such constitution, statute, commission or authority." No minimum amount to be involved in order to admit of an appeal to the Supreme Court was imposed in these classes of cases, for it was seen that in a case involving but a slight pecuniary amount, a federal question might be involved, the settlement of which would be of great importance to the whole people.

The cases decided by the Supreme Court are of two classes. First, those of original jurisdiction, as specified in the constitution; and second, those of appellate jurisdiction. Of this latter class there are two kinds, those coming to the Supreme Court by way of appeal from the lower federal courts, and those coming thither by way of appeal from the highest state courts.

Besides the courts which have been mentioned there are a few other federal courts. The District of Columbia being under the direct control of the United States, its courts are federal tribunals, and cases in them admit of an appeal or writs of error or certiorari to the Supreme Court. The same is true of territorial courts established by federal authority.

Though a sovereign nation, and therefore not liable to suit, the United States permits parties having claims against it, to sue for the amount, and for this purpose has established at Washington a Court of Claims, held by five judges. From this court appeals lie, in some cases to the Supreme Court, and in other cases they are referred to Congress for final adjudication.—*Extracts, see 1, p. 320.*

The Genesis of Our Supreme Tribunal

by Hon. Charles Evans Hughes,

Chief Justice of the United States

THE Supreme Court of the United States is distinctly American in conception and function, and owes little to prior judicial institutions aside from the Anglo-Saxon tradition of law and judicial processes. In considering the historical background of the Court, it does not aid much to review experiences in other lands.

A Federal judiciary was an essential part of the conception of a national government of a Federal type. Such a government must have its legislature and a court to interpret legislation. State courts would be bound by Federal laws and would have to apply them, but final interpretation of such laws could not be left to a State tribunal, much less to the tribunals of a number of States whose judgments might not agree. The proposed Federal Government was of necessity, in view of the existence of the States and of the sentiment which supported them as autonomous within their spheres, to be one of limited powers. To establish such a government was the purpose of a written constitution. The framers of the Constitution intended that the Federal Government to be set up should act directly upon the individual citizen and not simply upon the States. This was the essence of its national character. If there was to be a written constitution defining, and thus limiting, Federal powers, and these definitions were to have the force of constitutional or supreme law, it would be essential that the tribunal which interpreted and applied Federal law should recognize and apply the limits of both Federal and State authority. And as that government acted upon the individual citizen, he was deemed to be entitled to invoke its limitations. Thus, in the most natural way, as the result of the creation of Federal law under a written constitution conferring limited powers, the Supreme Court of the United States came into being with its unique function. That court maintains the balance between State and Nation through the maintenance of the rights and duties of individuals.

The men who sat in the Federal Convention of 1787 had political ideals but these did not run away with their practical judgment. The appreciation of definite exigencies had slowly developed a national consciousness. The character of the tribunal set up was due not to experience abroad or to the wisdom of other peoples, but to convictions which had become deep-seated as a result of the experiences of the Colonies and of the States that succeeded them. The common law of England, variously interpreted in the courts of the Colonies, was the basis of their jurisprudence.

The experience under the Confederation amply demonstrated the necessity of defining and firmly establishing the Federal judicial power.

As the larger number of the members of the Federal Convention, including those enjoying the highest prestige because of their learning, ability and public service, favored a strong national government in this sense, it was natural that there should have been but little question as to the necessity of having a national judiciary. Its creation was a part of the conception of the division of powers.

With this measure of agreement, the Convention proceeded to the consideration of the organization of the judicial department. How many courts should there be? How should the judges be appointed? What should be their tenure? What should be the extent of jurisdiction? The Convention was peculiarly fitted to deal with these questions. Of its fifty-five members, there were thirty-one lawyers, equipped not only with the technical learning of their professions but with a broad experience in practical affairs which gave them a seasoned judgment and the vision of statesmen. Four had studied in the Inner Temple, five in the Middle Temple, ten had been State Judges, seven had been selected as judges to determine controversies between the States. Thirty-nine members of the Convention had served in the Continental Congress. Eight had taken part in the formulation of State constitutions. They were well qualified for every part of their task, and especially for the creation of the judicial institutions essential to the national life.

The Convention quickly determined on "one supreme tribunal," instead of one or more supreme tribunals.

Serious questions were raised as to the method of appointing the judges. How was the ideal of the separation of powers to be reconciled with practical exigencies? Despite the emphatic terms in which the political maxim had been laid down by the States, Madison found not a single instance in which the several departments of power have been kept absolutely separate and distinct." Jefferson in his "Notes on Virginia" observed that the legislature had in many instances "decided rights which should have been left to judiciary controversy." After a careful review of State practice, Madison concluded that "the legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."

In many States, the legislature appointed the judges directly, and, notwithstanding the devotion to the doctrine of Montesquieu, it is not surprising that in the Federal Convention the Virginia plan should have proposed that the national legislature should appoint the judges of the Supreme Court. Meanwhile it had been suggested, with reference to the practice in Massachusetts, that the judges be appointed by the Executive, with the advice and consent of the Senate, and this proposal was finally adopted.

The unanimity of view that the tenure of the judges should be during good behavior was due to the grave importance attached to their independence. The framers of the Constitution were intent on protection against legislative encroachments, and put their trust in the learning, ability, and conscientiousness of the judges rather than in any device of political mastery.—*Extracts, see 2, p. 320.*

Politics Involved in Early Attacks on Judicial Powers

UPON his inauguration as President in 1797 John Adams appointed John Marshall, Secretary of State. On January 20, 1801, he appointed Marshall Chief Justice of the United States, to succeed Oliver Ellsworth of Connecticut, who had resigned. From that date until March 4, 1801, when Thomas Jefferson was inaugurated, Marshall held both positions.

Marshall's Appointment Opposed

Marshall's appointment as Chief Justice was opposed by Federalists and anti-Federalists alike. The former wanted Justice Paterson of New Jersey, a member of the court, promoted. Charles Warren, in "The Supreme Court in United States History," states that the leading Federalists in the Senate were prepared to defeat Marshall's confirmation but finally yielded to President Adams' insistence. Warren also points out that President Washington had a high regard for Marshall. Washington had insisted that Marshall become a candidate for Congress which he did successfully, with the result that Marshall came into close contact with Adams. "It may justly be said," declares Warren, "that it was primarily to Washington that the country owed its great Chief Justice."

The Jeffersonian anti-Federalists objected to Marshall as a prominent Federalist and Jefferson and Marshall disliked each other personally.

Thomas Jefferson came into the Presidency as the result of a hot political campaign in which feeling had run high, ending with the election of Jefferson over Burr by the House on February 17, by the narrow majority of one vote.

The "Midnight Judges"

On February 13, 1801, Congress passed the Circuit Court Act, changing the entire judicial system. The original Judiciary Act of 1789 required Supreme Court Justices to sit in the United States Circuit Courts throughout the country. The Supreme Court Justices had complained of this system as being too arduous and President Washington had urged the passage of legislation to remedy the situation.

The new act reduced the membership of the Supreme Court from 6 to 5, provided for 6 judicial circuits, located without regard to state boundaries, with 16 separate district judges.

President Adams, in the closing days of his Administration, appointed the 16 judges provided for in the Act. By March 2 the Senate had confirmed all these judges.

The passage of the Act and the appointment of the judges was bitterly criticized by Thomas Jefferson and his Anti-Federalist followers, who charged that the purpose of the Act was to keep the Courts wholly Federalist. The 16 judges appointed by Adams were called "Midnight Judges" because of their appointment at the very close of the Adams Administration.

Anti-Federalist Feeling Against Federal Courts

Jefferson and the anti-Federalists had favored the repudiation of the British debts, but the United States Courts had denied the validity of State confiscation and enforced their payment. The anti-Federalists had been pro-French and opposed to neutrality at the time President Washington had insisted on neutrality and the Courts had upheld their own jurisdiction to enforce the international obligations of the country as a neutral. The courts had declared the Alien and Sedition Laws to be Constitutional.

Thus the passage of the Judiciary Act and the appointment of the judges by Adams increased the already burning animosity of the Jeffersonians to the Courts, expressed freely during the campaign of 1800, since they regarded this as a final effort to intrench the Federalist Party.

President Jefferson and Court Decisions

Soon after Jefferson became President, two Circuit Judges in the District of Columbia ordered the District Attorney to institute a suit for libel against the *National Intelligencer*, an Administration newspaper published in Washington, which had printed attacks on the Judiciary. Later a United States Court in Connecticut ruled against Jefferson, who had ordered a French ship, seized during the recent hostilities with France, and then in the custody of the Court, sold and the proceeds returned to the owners. The Clerk of the Court asked for instructions from the Court. The Court ruled that only Congress could appropriate money and that the proceeds of the sale of the ship must be turned into the United States Treasury. Federalist newspapers in commenting on this case had characterized Jefferson's orders as a usurpation of authority. Jeffersonians, on the other hand, considered the action of the Court a political move by Federalist judges, designed to thwart Jefferson.

This was the condition of political affairs that existed when the now famous case of Marbury vs. Madison came before the Supreme Court.

Events Preceding the Marbury v. Madison Case

On February 27, 1801, the organic Act of the District of Columbia had been passed, containing a provision for the appointment by the President of 42 justices of the peace. The commissions had been signed by President Adams and sent to the Acting Secretary of State, John Marshall, for delivery to the appointees. All of these commissions, however, had not been delivered when Jefferson became President. Immediately after his inauguration, Jefferson ordered the undelivered commissions cancelled.

Four of the Adams appointees, William Marbury of Washington and Dennis Ramsay, Robert R. Hooe and William Harper of Alexandria, filed suit in the Supreme Court against James Madison, who had succeeded Marshall as Secretary of State, to compel him to deliver their commissions. Jefferson characterized the suit as a political effort to use the Courts to interfere with Executive prerogatives and an effort to head off efforts by the Jeffersonians in Congress to repeal the Circuit Court Act.

Repeal of the Circuit Court Act of 1801

On March 31, 1802, Jefferson approved the Act repealing the Circuit Court Act of 1801. Under the new Act the country was divided into three, instead of six, circuits. A separate Justice of the Supreme Court was assigned to each Circuit, who, sitting with a District Judge, formed the Circuit Court.

The debates on this bill in both the Senate and House had been bitter, the Jeffersonians attacking the Courts and the Federalists defending them and charging that the proposed repeal of the Circuit Court Act of 1801 was an effort to water down the Constitution.

Charles Warren states that it was during these debates in the House and Senate that there occurred, for the first time, a serious challenge to the power of the Judiciary to pass on the constitutionality of Acts of Congress.

Congressional Debates of 1802

The Jeffersonian Anti-Federalists had, during the Adams Administration, criticized the Courts for not declaring the Alien and Sedition Laws unconstitutional, and thus curb what they had characterized as Congressional aggression. But, during the debates over the repeal bill, the Federalists took the position that the proposed measure was unconstitutional and would be so held by the Courts. To meet this argument, Anti-Federalist Senators and Representatives from Virginia, Kentucky, North Carolina and Georgia argued that under the Constitution the Courts had no such power. Senator John Breckenridge of Kentucky, who, in 1798 had introduced in the Kentucky Legislature a resolution declaring that Congress was not the final authority on the constitutionality of a law enacted by it, took the opposite position in the debates of 1802. Most of the Federalists and some of the Anti-Federalists, including men who had been members of the Constitutional Convention, expressed the view that the Courts had the power to declare a Congressional Act unconstitutional.

Supreme Court Adjourned for 14 Months

Anticipating that the constitutionality of their Circuit Court Repeal Law would be tested before the Supreme Court, the Jeffersonians followed it by passing an Act abolishing the June and December terms of the Supreme Court and restoring the old February term, but not the old August term. By this measure they forced the adjournment of the Court for 14 months, from December, 1801, to February, 1803.

It was because of this that the Marbury vs. Madison suit, filed in December, 1801, did not come up for hearing before the Supreme Court until February 9, 1803. Charles Lee, Marbury's counsel, had difficulty in proving the facts in the case because Secretary of State Madison and Attorney General Lincoln objected to testifying.

The Marbury v. Madison Decision

On February 24 Chief Justice Marshall handed down the opinion of the Court, which was to the effect that while Marbury had a right to his commission the Supreme Court had no Constitutional right to issue a mandamus to a member of the Executive branch of the Government.

"The province of the Court," he stated, "is, solely, to decide on the rights of individuals, not to enquire how the Executive, or Executive Officers perform duties in which they have discretion." The decision was taken to mean that Marbury's remedy lay in the inferior courts, the Supreme Court having no original jurisdiction.

In the opinion, however, Marshall reviewed the provisions of the Constitution as affecting the power of the Courts and their function of passing on the Constitutionality of Acts of Congress. (*See below.*)

Contemporary Criticism of the Decision

According to Warren, there was comparatively little criticism at the time of Marshall's pronouncement of power of the Supreme Court to declare Acts of Congress unconstitutional. The Federalist Papers praised the decision as a slap at Jefferson's attempts at usurpation of power, while the Jeffersonian papers attacked that part of the decision which held that Marbury was entitled to his commission on the ground that the expression of such opinion by the Court was an attempt to interfere with the rights of the Executive.

Marshall's Famous Opinion on Powers of Supreme Court

Rendered in Marbury vs. Madison Case February 24, 1803

THE question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

The Supreme Authority of the People

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which

they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The Constitution Created a Limited Government

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant of it; or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

Constitutional Law Paramount to Legislative Action

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

Fundamental Principles of American Government

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

The "Essence of Judicial Duty"

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

A Subversive Doctrine

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The Constitution and the Judicial Powers and Duty

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by judges. And if they can open it all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder of *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

What the Framers of the Constitution Intended.

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or

a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

The Oath of Office of the Judges

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

The Supreme Law of the Land

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

Chief Justices of U. S. Supreme Court, 1789-1935

Name	*State*	*Term*	*Service*
John Jay	New York	1789-1795	6
John Rutledge[1]	South Carolina	1795-1795	..
Oliver Ellsworth	Connecticut	1796-1801	5
John Marshall	Virginia	1801-1835	34
Roger B. Taney	Maryland	1836-1864	28
Salmon P. Chase	Ohio	1864-1873	9
Morrison R. Waite	Ohio	1874-1888	14
Melville W. Fuller	Illinois	1888-1910	22
Edward D. White[2]	Louisiana	1910-1921	11
William Howard Taft	Ohio	1921-1930	9
Charles Evans Hughes[3]	New York	1930-	

[1] *Commissioned July 1, 1795 (in recess), presided at August term 1795. Not confirmed.*

[2] *Also served as Associate Justice from 1894 to 1910.*

[3] *Also served as Associate Justice, 1910-1916.*

Sporadic Attacks Made on Supreme Court Since 1803

On March 2, 1803, a case came before the Supreme Court (Stuart vs. Laird) testing the constitutionality of the Circuit Court Act of 1802. In an opinion delivered by Justice Paterson the Court upheld the Constitutionality of the Act. The questions involved were the right of Congress, by repealing the Judiciary Act of 1801, to abolish the judicial positions the Act of 1801 had created, and the right of Congress to impose upon Supreme Court Justices the duty of sitting in the new Circuit Courts.

But in May, during a charge to a Federal grand jury in Baltimore, Justice Chase, a strong Federalist, attacked the Circuit Court Act of 1802 as tending to destroy the independence of the judiciary and uttered severe criticisms against the Jefferson Administration.

Impeachment of Chase

This caused Jefferson to move for his impeachment, which was finally voted by the House. The trial opened January 2, 1805, in the Senate. On March 1, the vote was taken, with 19 for conviction and 15 for acquittal. This meant acquittal since a two-thirds vote of the 34 members of the Senate, or 23, was necessary for conviction. Of the 34 members of the Senate 25 were Jeffersonian Republicans and 9 were Federalists. This is the only instance of the impeachment of a Justice of the Supreme Court.

Warren states that the attempt of the Jeffersonians to remove Federal judges by impeachment proceedings was the forerunner of the suggestion by Theodore Roosevelt in his Progressive campaign of 1912 for the recall of judges.

Randolph's Resolution for Removal of Judges

Immediately following the acquittal of Chase, John Randolph of Virginia introduced in the House a resolution for a Constitutional Amendment providing for the removal, by the President, of judges of the Supreme Court and of all other Federal Courts on joint request of both houses of Congress.

Two of Aaron Burr's supporters, Erich Bollman and Samuel Swartwont, had been arrested in New Orleans and, in spite of a writ of habeas corpus, had been brought to Washington and kept under military arrest. On January 23 Jefferson asked Congress to authorize him to suspend the writ of habeas corpus. The Senate, in executive session behind closed doors, passed a bill to that effect but it was defeated in the House.

Efforts to Curb Courts Following the Burr Case

1807—The refusal of the Circuit Court at Richmond, in 1807, to convict Aaron Burr of treason again aroused the Jeffersonians to attacks on the Court. Chief Justice Marshall, who presided at Richmond, made his famous ruling on the sufficiency of evidence of treason.

1808—As a result of Marshall's rulings in the Burr case, Jeffersonians introduced in Congress, in 1808, resolu-

tions to amend the Constitution to limit the terms of office of Federal Judges and for their removal from office on address of two-thirds of the membership of each house, but they failed of passage.

Decisions on the Embargo Act of 1808

Under the Embargo Act of April 25, 1808, collectors of customs were required to detain any vessel ostensibly bound with cargo to United States ports whenever, in their opinion, the intention was to evade the embargo. President Jefferson ordered the Secretary of the Treasury to order all Vessels loaded with provisions to be held by the collectors.

On May 24 a vessel owner in Charleston, petitioned for a mandamus to compel the collector to permit clearance of a vessel bound for Baltimore with rice. Sitting in the Circuit Court, Justice Johnson, of the Supreme Court, the first man appointed to the Court by President Jefferson, granted the mandamus, on the ground that the orders to the collector at Charleston were not warranted by the statute.

Jefferson, angered by the decision, had his Attorney General, Caesar A. Rodney, deliver an opinion controverting Justice Johnson's statement of the law and distribute it to the press. This created a stir and the matter was widely discussed. Later the Supreme Court upheld the Constitutionality of the Embargo Act, but various Circuit Court decisions subsequently hampered its administration, thereby increasing Jefferson's antipathy to the Courts.

1819—In the year 1819, the Court upheld the right of the Bank of the United States to be freed from an unconstitutional State tax. Marshall's great opinion in *McCulloch* v. *Maryland*, was assailed, at the time of its delivery, as "fraught with alarming consequences," "undermining the pillars of the Constitution," "a total prostration of State rights and the loss of the liberties of the nation."

1837—Eighteen years later, however, in 1837, on its decision of the *Charles River Bridge Case*, by which the Court, instead of upholding a corporate monopoly, overthrew one, it was assailed as the destroyer of property, and as the enemy of all investors in corporate stock.

1848—Eleven years later, in 1848, when it upheld the right to take by eminent domain chartered rights, in *West River Bridge Co.* v. *Dix*, it was praised as having dealt "a great blow at monopoly" and "triumphantly sustained the republican doctrine that a corporation has no more right than individuals."

1854—Nine years later, however, in 1854, the same Court was assailed with the contrary cry that it was corporation-ridden, when by the decision in the *Bank Tax Exemption Cases*, it held an Ohio statute invalid.

1850-55—During the years 1850 to 1855 (long before the *Dred Scott Case*), the Court was continuously and savagely assailed in Congress by anti-slavery press.

1858—In 1858, when the Court sustained the validity of the Fugitive Slave Law in the Booth Cases and when the Wisconsin Courts and the Legislature actively adopted the policy of Nullification, attacks on the Court by Republican and anti-slavery statesmen and newspapers were unmeasured in their language.

1861—Even during the Civil War, and after the new appointments by President Lincoln had given a majority of the Justices to the Republican party, the failure of the Court to decide all cases arising out of the war, in exact consonance with the views of Republican leaders, led to continued attack. 1867—In 1867, the Court was subjected to a most violent assault for its decision in the famous *Milligan Case*, in which it upheld the rights of the citizen against the Executive, and denied the latter's right to institute military Courts, outside the active theatre of war. The decision is now regarded as one of the great bulwarks of American liberty.

The Radical Reconstructionists, who desired to see all participants in the cause of the Confederacy treated as traitors and denied any civil rights or privileges, were still further enraged by two decisions of the Court, rendered on January 14, 1867, in *Cummings* v. *Missouri* and *Ex parte Garland*, 4 Wall. 277, 333,—decisions which revealed the Court as wholly unaffected by the tumult raised by its Milligan decision. The attacks on these decisions were again of the most violent character.

1868—In the years since 1868, a series of criticisms followed almost every important decision of the Court.

1895—The year 1895 was notable for the decision of three great cases in which the public took the liveliest interest. In the first, decided January 21, the Court passed for the first time on the application of the Sherman Anti-Trust Act to commercial corporations, and in *United States* v. *E. C. Knight Co.*, 156 U.S.1,—the *Sugar Trust Case*,—held that, on the facts presented, the corporations involved in the combination refining sugar were not engaged in interstate commerce. The result was a disappointment to those who relied on the Act as a destroyer of the trusts. The second case involved the constitutionality of the Income Tax imposed in the Wilson-Gorman Tariff Act in President Cleveland's Administration, *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429, 158 U.S. 601; and the unfortunate circumstances attending this case aroused further bitter attacks upon the Court.

1897—In 1897, the Court, to the shock of the business world, for the first time announced, in *United States* v. *Trans-Missouri Freight Assoc.*, 166 U.S. 290, that railroad pools were illegal under the Sherman Act directed against combinations in restraint of interstate trade; eleven years later, when the case of *Loewe* v. *Lawlor*, 208 U.S. 274, was decided in 1908, the labor unions were equally shocked to find that a labor boycott obstructing the free flow of commerce between the States came also within the prohibition of the Sherman Act.

1905—In the year 1905, the decision in *Lochner* v. *New York*, 198 U.S. 45, holding the New York bakers' ten-hour-law unconstitutional—one of the very few cases in which the Court has ever held invalid any State legislation designed to protect the laboring class for the welfare of society—aroused widespread public discussion, and evoked another series of attacks, such as had taken place, ten years previously, in 1896, over the Court's alleged exercise of an usurped power in passing upon the validity of statutes.

1908—In 1908, two cases in which Federal statutes were held invalid as beyond the power of Congress under the Commerce Clause produced some criticism of the Court—*The Employers' Liability Cases*, 207 U.S. 463, and *Adair* v. *United States*, 208 U.S. 161—the latter case involving the law prohibiting railroad discrimination against

union labor. The decision that regulation of employment with reference to union conditions had no reasonable relation to interstate commerce caused much surprise and antagonism.

In 1908, in *Ex parte Young*, 209 U.S. 123, the Court decided that the Attorney-General of the State of Minnesota could be enjoined from bringing any proceedings to enforce against the Northern Pacific Railroad in the State courts the State Railroad Rate Law, and could be fined for contempt if he disobeyed the injunction. The decision aroused harsh criticism throughout the country.

1908—The Employers' Liability Act was declared unconstitutional but Congress rewrote the Act in conformity with the Supreme Court's decision.

In the Adair Case the Court decided an Act of Congress forbidding the discharge by a railroad of an employee for belonging to a labor union, which caused criticism by organized labor.

1918—The first Child Labor Act was declared unconstitutional and was later redrafted and repassed.

1923—The second Child Labor Act was declared unconstitutional and the decision aroused criticism of the Court. Senators Borah and the elder La Follette introduced resolutions providing that Congress have power to override decisions of the Court and wrote and spoke on them.

Senator Norris and others revived the question from time to time but made no headway.

The Present Members of The Supreme Bench

The Chief Justice

CHARLES EVANS HUGHES: Republican, born Glen Falls, N. Y., April 11, 1862; LL.B. Columbia University, 1884; Governor of New York, 1907-1910; appointed Associate Justice, U. S. Supreme Court by President Taft, May 2, 1910; resigned June 10, 1916, to accept Republican nomination for the Presidency; appointed U. S. Secretary of State, March 5, 1921; U. S. delegate to and chairman of, the Conference on Limitation of Armament, Washington, 1921; special ambassador to the Brazilian Centenary Celebration, Rio de Janeiro, 1922; chairman, New York State Reorganization Commission, 1926; chairman, U. S. delegation to Sixth Pan American Conference, Havana, Cuba, 1928; U. S. delegate Pan American Conference on Arbitration and Conciliation 1928-9, Washington, D. C.; member of Court of International Justice, 1928-30; appointed, by President Hoover, Chief Justice of the United States, February 3, 1930, confirmed by the Senate, February 13, 1930.

The Associate Justices

WILLIS VAN DEVANTER: Republican, born Marion, Ind., April 17, 1859. Graduate, Law School Cincinnati College, 1881; Chief Justice, Wyoming, 1889-90; U. S. Assistant Attorney General, 1897-1903; appointed U. S. Circuit Judge by President Theodore Roosevelt, 1903; appointed Associated Justice, Supreme Court of the United States by President Taft, December 16, 1910.

JAMES CLARK MCREYNOLDS: Democrat, born Elkton, Ky., Feb. 3, 1862; Graduate University of Virginia law department, 1884; Assistant Attorney General of the United States, 1903-1907; appointed Attorney General of the United States by President Wilson, March 5, 1913, and Associate Justice of the Supreme Court of the United States, August 29, 1914.

LOUIS DEMBITZ BRANDEIS: Democrat, born Louisville, Ky., November 13, 1856; attended Annen, Real Schule in Dresden and Saxony, 1873 to 1875; LL.B., Harvard Law School, 1877. Appointed Associate Justice of the Supreme Court of the United States by President Wilson, January 28, 1916.

GEORGE SUTHERLAND: Republican, born March 25, 1862, Buckinghamshire, England; law student at University of Michigan, 1882-3. Appointed by President Harding to be Associate Justice of the Supreme Court of the United States, September 5, 1922.

PIERCE BUTLER: Republican, born March 17, 1866, Waterford, Minn. Graduate of Carleton College in 1887; nominated by President Harding to be Associate Justice of the Supreme Court of the United States, November 23, 1922.

HARLAN F. STONE: Born in Chesterfield, N. H., Oct. 11, 1872. LL.B. 1898 Columbia Law School; appointed Attorney General of the United States April 7, 1924; nominated Associate Justice of the Supreme Court of the United States by President Coolidge, January 5, 1925, confirmed by Senate, February 5, 1925.

OWEN J. ROBERTS: Republican, of Philadelphia, Pa., born May 2, 1875. LL.B. University of Pennsylvania, 1898; appointed special deputy attorney general to represent the United States in prosecution of cases arising under espionage act in eastern district of Pennsylvania during the World War; also represented the United States Housing Corporation in Philadelphia; appointed by President Coolidge one of two attorneys to prosecute cases arising under leases of Government lands in California and Wyoming, in 1924; nominated Associate Justice of the Supreme Court of the United States by President Hoover, May 9, 1930; confirmed by the Senate, May 20, 1930.

BENJAMIN N. CARDOZO: Democrat, born in New York City, May 24, 1870; A. M., Columbia University, 1889, admitted to the bar, 1891. Elected Justice of the Supreme Court of New York for term beginning January 1, 1914; designated by the Governor to act as Associate Judge of the Court of Appeals of N. Y., Feb. 2, 1914; elected Associated Judge of the Court of Appeals for term beginning Jan. 1, 1918; elected Chief Judge of the Court of Appeals for term beginning Jan. 1, 1927; nominated by President Hoover Feb. 15, 1932, Associate Justice of the Supreme Court of the United States, and confirmed by the Senate, Feb. 24, 1932.

How the Supreme Court Has Dealt With the "New Deal"

by John W. Hester

Attorney, U. S. Reconstruction Finance Corporation

UPON the subject of the United States Supreme Court and its relation to the "New Deal" program does the record show the Court to be hostile or friendly to the "New Deal"? If truly interpreted, it shows neither. Considering the term "New Deal" as a governmental concept whereby emphasis is placed upon the obligation to aid the unfortunate victims of the depression, the Court has probably been favorable to the "New Deal" oftener than otherwise.

The First "New Deal" Decision

On January 8, 1934, the Court had before it its first truly "New Deal" legislation for consideration in the form of the Minnesota moratorium law. True, it was a State enactment, but it embodied the spirit of the "New Deal" as heretofore defined. The right of foreclosure of mortgages was suspended for a period of the emergency, not to exceed 2 years. The Court received the commendation of all "New Dealers" when it sustained the act, and Chief Justice Hughes, who wrote the opinion for the Court, was acclaimed the humanitarian jurist par excellence. The Court held that the State, in entering the Union, or Federal State, did so with the implied reservation of the power of self-preservation; that although it surrendered the power to impair the obligation of a contract, yet it reserved, impliedly, the power to suspend the remedies thereunder during the period of the emergency. But such reserved power was held to abate as the emergency disappeared, and that contractual rights could not under the act be arbitrarily suspended for any period of time, not for a day even.

Other Pro "New Deal" Decisions

Then on March 5, 1934, the popularity of the Court was further enhanced by the decision in the Nebbia case, popularly known as the "New York milk case." Mr. Justice Roberts wrote the opinion for the Court, and he held that the phrase "affected with a public interest" can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.

The "New Dealers'" confidence in the Court was enhanced further by the decision of April 2, 1934, upholding the State of Washington statute imposing an excise tax of 15 cents per pound on all sales of butter substitutes by distributors, which the State had enacted for the benefit of the dairying industry of the State; and the decision of December 3, 1934, upholding an emergency statute of Maryland limiting and changing the rights of mortgages with respect to foreclosure proceedings, was regarded as further evidence that the Court had gone decidedly pro "New Deal."

First Anti-"New Deal" Decision

But all these decisions involved State enactments, which were based upon the exercise of the inherent police power of the States, which power the Federal Government does not possess, it being merely a Government of limited or delegated powers. So the "New Dealers" were in for a jolt when it came to the enactments of the Congress, and on January 7, 1935, they received a shock, not fatal to be sure, but a shock nevertheless, when the Court held section 9 (c) of the NRA invalid in that the Congress unconstitutionally delegated its legislative power to the President in the matter of the control of the production of oil.

Further "Pro" Decisions

However, the confidence in the Court's pro "New Deal" attitude was revived about 6 weeks later when it upheld the joint resolution of the Congress abrogating the gold clause in private contracts; and the denial to the Government of the similar right as to its bonds was considered a Government victory, inasmuch as the holders of such bonds were deprived of a remedy by the measure of damage prescribed by the Court. Evidencing the conviction that the Court was really with the "New Deal," the decision sustaining the railroad bankruptcy amendment to the general bankruptcy act was cited with great glee.

Further "Anti" Decisions

But the favor that the Court had won in "New Deal" circles by its gold-clause and railroad-bankruptcy decisions was short-lived. On May 6, 1935, the Court held the Railroad Retirement Act unconstitutional, which caused "New Dealers" to doubt the friendliness of the Court for the "New Deal" program. But the solar plexus, or knockout blow, was to come some 3 weeks later when the Court rendered its devastating blows—a blow in each eye and a bump upon the nose all in one action, as it were. Then the wail went to high heaven that the Court had gone reactionary, that it had strait-jacketed the country and returned it thus bound to the outmoded "horse-and-buggy" period.

Plaint Unjustified

However, the Court had merely held that the conditions of production, manufacture and distribution were not covered by the commerce clause of the Constitution. That, in substance, was the decision of the Schechter, or "sick-chicken" case. It merely held that the arbitrary suspension of the mortgagee's rights in farm mortgages for a period of 5 years was unreasonable and therefore invalid, which was the case of the Frazier-Lemke farm mortgage act. And the further holding that the President could not remove at will a member from a quasi-judicial and quasi-legislative commission, such as the Federal

Trade Commission. This was the Humphrey removal case.

The Court has really been disposed to give the "New Deal" latitude in which to work out its program. In the oil cases it exacted only a compliance with the constitutional requirement that the Congress do the legislating, leaving to the Executive, board, or commission, as the case might be, the power to make rules and regulations for the enforcement of the laws, but it did hold that the Congress should declare a policy and establish a standard for the administrative agency.

No one can fairly quarrel with the Court on that score. In fact, no one can read the concurring opinion of Mr. Justice Cardozo in the Schechter case without getting the feeling that he was writing under feeling of resentment toward the Congress for completely abdicating its legislative function, for he lashes, as it were, with a scorpion the failure of legislative function. And no man, in fairness, can deny the social-mindedness of Mr. Justice Cardozo—that he and the other liberals of the Court concur in the three opinions which knocked the "New Dealers" groggy.

No, the Court is not reactionary or "anti-new deal." It has done what it has always done—construe the law in the light of the Constitution and make it conform thereto. The fact that the Court has frustrated a portion of the "new deal" and will probably frustrate more is no reason to get mad with it. For the first 70 years of the history of the Government it was quarreled with because it upheld the acts of Congress against the wishes of a large portion of the people. Now that it holds invalid some of the acts of the Congress it naturally offends those who sympathize with such enactments. But a Constitution without a court to make its provisions effective is meaningless. Constitutions are adopted for the purpose of preventing the execution of unwise and dangerous laws by requiring that the laws conform to the basic principles laid down.—*Extracts, see 12, p. 320.*

Anti-Supreme Court Measures Now Pending in Congress

The decision of the Supreme Court declaring the National Industrial Recovery Act unconstitutional was the signal for a number of new bills and resolutions to be introduced in Congress during the late spring and early summer of 1935, and to bring to the attention of the public of several that were already pending, to curb the powers of the Supreme Court.

These measures range from simple measures to prohibit the Court, by legislative enactment, from passing on the constitutionality of Acts of Congress, to resolutions calling for Constitutional amendments. Some would make Congress the sole judge of the constitutionality of its Acts, others would have the Supreme Court render immediate advisory opinions on Acts whose constitutionality was in doubt, and others would require a two-thirds or a three-fourths vote of the Court to declare an Act unconstitutional.

Practically all of these various measures were referred to the Senate or House Committee on the Judiciary.

On none of these measures did these committees take action.

Whether they will be considered at the coming session cannot be predicted. Much will depend upon the Supreme Court's decisions on other cases brought up to test the validity of "New Deal" legislation.

So far in the record of attempted legislative attacks on the Supreme Court, no committee of either house has gone so far as to hold hearings on any bill or resolution.

Unless strong pressure is brought by New Deal Senators and Representatives it appears doubtful that any of the pending bills will be taken up by a committee.

Among the bills and resolutions now before Congress affecting the Supreme Court are the following:

Representative Monoghan of Montana has introduced a resolution forbidding Federal judges to declare an Act of Congress unconstitutional upon penalty of forfeiture of their positions and providing that the mere passage of an Act by Congress shall be conclusive presumption that that Act is constitutional.

Senator La Follette, Progressive, and Representatives Cross of Texas, Tolan of California, and Hobbs of Alabama have introduced resolutions for a Constitutional Amendment providing that the President, through the Attorney General, when in doubt as to the constitutionality of an Act of Congress, may call upon the Supreme Court for an immediate written opinion. Representative Tolan's resolution provides that Congress, as well as the President, may call for immediate advisory opinions.

Representatives Crosser of Ohio and Young have introduced bills providing that three-fourths of the members of the Supreme Court shall concur before the Court may declare an Act of Congress unconstitutional.

Representative Ramsay of West Virginia has introduced a bill requiring that seven of the nine members of the Supreme Court must concur before the Court may declare an Act unconstitutional, and a joint resolution for a Constitutional Amendment providing that the inferior Federal courts shall not pass on the constitutionality of an Act of Congress and that three-fourths of the judges of the Supreme Court must concur in such declaration.

Senator Norris of Nebraska has offered a resolution for a Constitutional Amendment giving the Supreme Court exclusive jurisdiction to declare Acts of Congress unconstitutional and then only by a two-thirds majority of the Court and provided the action is begun within 6 months after the passage of the Act.

Representative Sisson of New York introduced a resolution calling upon the House Committee on the Judiciary to make a study of the right of the Supreme Court to declare an Act of Congress unconstitutional and make a written report to the House. The Sisson resolution was referred to the Committee on Rules.

Should Congress Be Empowered To Override Supreme Court Decisions?

PRO

Affirmative

★ *Representative Sisson maintains that the Supreme Court has no Constitutional power to declare Acts of Congress unconstitutional; that judicial veto is unnecessary, has been harmful in practice and should be abolished.*

by

Hon. Fred J. Sisson

U. S. Representative, New York, Democrat

ON the question of the power of the Federal judiciary to pass upon the constitutionality of acts of Congress I wish to make two points:

First, neither the Supreme Court nor any of the lower Federal courts have under the Constitution any right to adjudge an act of Congress unconstitutional; or in any suit between private litigants to pass upon the constitutionality of an act of Congress.

Second, the exercise or assumption of such power by the Supreme Court or other Federal courts is not only unnecessary in our system of government, but it is also positively harmful, and its continued assumption and exercise in these times constitute a danger to our form of government and our economic system, such as may at any time cause them to break down.

The proof of my first point that such power is not given to the Supreme Court or other Federal courts in the Constitution requires, of course, not only a careful reading of the Constitution itself, which may be easily done by any lawyer or other student of our Government; but also in order to determine the intention of the framers of the Constitution with respect to this power of judicial nullification, a study of the Constitutional Convention of 1787 from the contemporary sources of the history of the Convention, consisting of the notes of the Convention as kept by Madison, Pierce, King, Hamilton and others. My conclusions as to the intention of the makers are gathered from such sources and from such valuable contributions to the history of the Constitution and the purposes of its makers as have been made by Jackson H. Ralston, Esq., Dr. Edward S. Corwin, professor of jurisprudence of Princeton University; Horace A. Davis, Esq. of Brookline, Mass.; Dr. James F. Lawson, of Falls Church, Va., and several others from whom I have borrowed very liberally and to whom I make my grateful acknowledgment. My conclusions, however, may be readily checked and verified from the contemporary sources which I have mentioned and may be easily disproven if in any respect they are incorrect.

That the power of judicial nullification is conferred in language in the Constitution itself, no one of reputation as a lawyer, as a student of our Government and its origin will dare publicly assert, and if anyone so asserts, ask him to point out to you that part of the Constitution which either in words, or impliedly, confers upon the judicial branch of the Government power to override the legislative and, as in most cases, the executive branch of the Government. So much for the expressed power.

That I am right about this is as demonstrable as any mathematical proposition and requires only an examination of the Constitution itself.

It is equally demonstrable that no such power to the Supreme Court is implied in the Constitution or was so intended by the makers thereof or was understood by the Thirteen Original States when in their several conventions they ratified the Constitution and entered into the Federal Union.

Our Federal Constitution, in the form in which it was submitted to the 13 States, was prepared in the Constitutional Convention of 1787. That Convention, composed of delegates from 11 of the Original States, carefully and during its many weeks of deliberation, considered among other things as one of its most important questions what check or safeguard, if any, should be provided against the passage of laws by the legislative branch of the Federal Government that were beyond the Federal powers. Various measures were from time to time proposed, some of which were brought to a vote in the Convention.

The plan to give the judicial branch alone the power to override a law passed by the legislative branch, thereby making the act of the legislative branch (approved by the executive branch as was finally decided upon in the Convention) a nullity was never, in that Convention, seriously enough considered as to bring it to a vote. After much discussion of this question it was proposed in a resolution that a council of revision should be established for the purpose of passing upon the constitutionality of laws passed by Congress. This council of revision was to be composed of the members of the judicial branch when established (now the Supreme Court) and the executive branch (now the President); in other words, to annul a law passed by Congress the concurrence was necessary, not of the Court alone, but also of the President.

This was the only proposal looking to a judicial veto that was even brought to vote by the framers of our Constitution. It was also proposed in the same resolution that in the event a law passed by Congress was decided by such council of revision to be unconstitutional that the Congress might then repass the law by a two-thirds majority of each of the branches thereof, if either the members of the judiciary or the executive disapproved, and by a three-fourths majority if both the members of the judiciary and the executive disapproved. This resolution, a much more guarded and less drastic form of judicial veto or nullification by the Court than now employed,

Pro continued on page 304

Should Congress Be Empowered to Override Supreme Court Decisions?

Negative

CON

★ *Senator Vandenberg maintains that the Supreme Court protects the people against legislative or executive usurpation and that attacks on the Court are really disguised attacks on the Constitution.*

by
Hon. Arthur H. Vandenberg,
U. S. Senator, Michigan, Republican

THE Constitution of the United States once more is a live issue before the American people, because of recent epochal events in the following sequence:

First. The Supreme Court, in a series of unanimous decisions, decided that the Federal Government must keep hands off the internal business of the States; that Congress must quit delegating legislative power to the President and lesser bureaucrats; that the President must release the hand of dictatorship from important functions heretofore usurped; in a word, that the Constitution is something more than a paper napkin at an economic picnic.

Second. The President promptly bowed to the authority of the Constitution as authentically asserted by the Supreme Court. But, in a burst of melancholy gloom he announced that this curb will throw America back to the old "horse-and-buggy" days—meaning anything prior to his own infatuated dispensation—and indicated his belief the Constitution probably needs change. His tone moderated a few days later; but his primary impulse was disclosed in his initial statement when goaded to candor by his initial collision with the Constitution. Manifestly, it must be nullification or amendment if much of the new collectivism shall persist.

Third. The Presidential reference to constitutional amendment immediately took hold, and, as usual where impatience governs, it swiftly graduated into impetuous discussions of broadest possible constitutional reconstruction by others—all proposals aiming, in some fashion, to break down existing constitutional restraints. Again we heard of the old scheme to make Congress supreme over the constitutionality of its own acts. One of our home-vacationing ambassadors even suggested a convention to rewrite the whole charter. Behind these three episodes were 2 years of restless encroachment upon the traditional American mode; 2 years of cumulative power in Washington at the expense of State home-rule and of individual independence; 2 years of congressional surrender to alphabetical commissars who deeply believe the American people need to be regimented by powerful overlords in order to be saved. In addition, there has arisen the new Federal subsidy system under which State's rights have been beguiled or bought or bludgeoned into coma.

Thus the Constitution and its traditional Americanism again are live issues. This is good if it leads to truth; incalculably bad if it misleads into treacherous innovations. The people must decide. The Constitution belongs exclusively to them. It cannot be changed by Presidents, courts, or Congresses. But eliminate the Supreme Court and the Constitution no longer is responsive solely to the people. It becomes whatever Congress wants or an ambitious White House dictates. It invites fascism at the "right" or communism at the "left." Today this cannot be true. The Constitution, speaking for the people, is above all government. It is the voice of the sum total of our citizenship. When it yields this character the Republic will join the rest of the world in the ashes of democracy.

It is vital that the people understand that if they desert the Constitution they desert themselves. They fall upon their own sword. "In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the Government to control the governed, then oblige it to control itself." Hence our Constitution, which none but the people may alter. Hence the Supreme Court to protect this right. The Constitution and the Court are the peoples' sole assurance that this right shall survive. Nothing could be more antiliberal than to strike it down. Justice David Davis, Lincoln's great friend said:

"The Constitution is a law for rulers and people and covers with the shield of its protection all classes of men at all times and under all circumstances."

Such a reliance will not be impetuously altered by a rational citizenship which knows the source of its liberty, security, and power. We owe open-minded study to any specific suggestions for constitutional amendments. But we owe a greater study to our history and experience under this great Charter to determine whether change is unavoidably required. Above all, we owe unyielding resistance to any attempts to cheat the Constitution without changing it. Not only the length but the direction of any innovation must be faithfully assessed. When we deal with the Constitution we deal with our birthright.

This does not pretend the Constitution is sacrosanct. This is not a static world. But our constant amazement has been to discover that this charter usually fits our changing needs if we seek patiently to find our answer within its boundary. Those who want to live within it, and have the ability to search the way, usually can reach any legitimate goal. Even the President's favorite Army general—the "crack down" genius who lived an imperial hour under the minatory wings of a synthetic eagle—denies any thesis to the contrary. The friendly Walter Lippmann said: "An amendment to turn over to the Na-

Con continued on page 305

was rejected by the convention by a vote of 8 States to 2 in favor of the Executive veto.

In short, the framers of the Constitution relied in the Constitution which they presented to the Thirteen States upon the method of the well-known, so-called "checks and balances," whereby each of the two branches of Congress should be a check upon the other, both as to hasty or unwise action and also as to unconstitutionality, and whereby the Executive, the President, through his veto power, should have a check upon both. No judicial check upon unconstitutional action by the legislative branch was submitted or intended.

The advocates of judicial nullification, however, make the historical argument of long-time acquiescence and rely in effect not upon a written but upon an unwritten constitution. Relying upon the saying that the law is what the judges say it is, they go back to Chief Justice Marshall's opinion in *Marbury* v. *Madison*, decided in 1803. They rely upon the oft-repeated statement that Marshall here asserted the power of judicial veto, and that it has never since been disputed. This case merely involved the appointment of a justice of the peace of the District of Columbia and did not, except so far as the jurisdiction of the Court was concerned, involve the constitutionality of an act of Congress. That part of Marshall's opinion in which he went out of his way to declare that the Supreme Court had the power to annul an act of Congress as being unconstitutional was pure dictum. There was no opportunity to challenge or contradict Marshall's statement except to say that it was unfounded, which Jefferson, then President, most pointedly did.

My second point, as stated above, is that the exercise or assumption of such power by the Supreme Court or other Federal courts is not only unnecessary in our system of government, but it is also positively harmful, and its continued assumption and exercise in these times constitutes a danger to our form of government and our economic system such as may at any time cause them to break down.

Now, I am going to be so bold as to make the statement that during the entire period of time from the first exercise of this assumed and unconstitutional power of the Supreme Court in the Dred Scott case in 1857 down to its recent decisions in the present year, in which the Court has exercised its power of nullifying acts of Congress, it will be found that in each of these the judges were exercising not a judicial function but a legislative or a sociological function.

I am also going to be bold enough to make this assertion: That in none of the cases wherein the Supreme Court has exercised the power or judicial nullification—from the Dred Scott decision or 1857 down to its decisions of the current year—has the Court really safeguarded either the rights of the people or the rights of the States. On the contrary, it has caused such a derangement of the functions of the Government itself as have in some instances required curing either by constitutional amendment or by a reversal by the Court of its own decisions.

It may be urged by some that the recent decision of the Court in the Schechter case, wherein the N.R.A. was, in effect, adjudged unconstitutional, was of constructive service. It may, I think, be conceded without harm to my argument that the N.R.A. was too hastily put together and that some of its provisions were unworkable. Its codes extended to certain businesses and trades in which enforcement was either too difficult or impossible. When that act was passed the economic system of the country was on the verge of collapse. It was not beyond the bounds of possibility or of danger that the flames of revolution might sweep over us. When a fire has been started and is about to spread, damage is sometimes caused to property by the fire department in quenching the fire. The Recovery Act needed to be revamped and this would have been done. I believe the Court, in the limitations placed upon interstate commerce in its decision, went much too far.

The Court recently adjudged the Railroad Retirement Act as unconstitutional. Language employed in such recent decisions of the Court threatens that the Social Security Act and other legislation—some pending and some passed by the Seventy-third Congress—will also receive the condemnation of the Court. All of these acts, such as the Railroad Retirement Act—all of the legislation now proposed and pending, such as the Social Security Act—are exercises on the part of the law-making branch of the Government of powers long exercised in other countries of the world. England, Germany and most of the self-governing dominions of Great Britain have long carried out these purposes as functions of government, and have built up thereby bulwarks against economic insecurity and economic waste and loss.

That an act may be passed by the Congress, representing the sovereign will of a sovereign people, approved by the Executive, also representing all of the people, that men may order their businesses and their lives, make their contracts and engagements under such law for years, only to have it stricken down years later by the assumed unconstitutional exercise of power by an appointive judiciary, is, I say, an anomalous and unbearable state of affairs and one wherein we fall short of the ability to exercise the sovereign powers of a nation.

Those who contend that it is unsafe to entrust a general power without check by an umpire, such as the Supreme Court, as a guard against the exceeding of constitutional limits, if they need authorities, I refer to Jefferson, Jackson, Lincoln, and the others of our great Presidents. That a power may be abused is no reason for its denial; and where, again, to paraphrase the words of Lincoln, can power be more safely lodged than in the representatives of the people, who, by their ballots, may speedily correct the abuse of its exercise. In the case of the abuse of this power by the law-making body, the people may correct it at the next election. In the case of a denial, a curtailment of a power necessary to the general welfare by this assumed unconstitutional usurpation by the Supreme Court, usually only death of a sufficient number of the members thereof can correct it.

The surest way to destroy the Constitution—our present form of government—is to give it such a rigid construction, at the same time not recognizing the general-welfare clause, as to make it too narrow and inflexible to meet

Pro continued on page 306

Vandenberg, *Cont'd*

tional Government omnipotent powers to regulate wages, hours, working conditions, trade practices, and prices would not be ratified by 10 States; would divide and wreck utterly the Democratic Party; would be just about the most superlative piece of idiocy by which any public leader would seek to cut his own throat." I admit a field of legitimate argument at this point. But it is my own view that concentrated Washington authority over the intimate lives and livelihoods of 125,000,000 people scattered across a broad and diversified continent would be both despotic and impractical.

But it is not my purpose to argue particular situations. I argue that the Supreme Court protects the people against usurpation—rather than being the usurper, as often pictured by impatient critics. I also argue the need to discriminate between amendments which change certain boundaries—as in the controversy over interstate commerce—and amendments which would destroy the basic structure of indispensable checks and balances. I question the former. I conclusively reject the latter.

These two types of amendment are again being discussed. One would enlarge Federal powers at the expense of State home rule. This trends toward greater bureaucratic centralization. The other would enlarge legislative and executive powers at the expense of judicial powers. This trends toward the vices of the European system. It invites surrender to an elective despotism. It would be the beginning of the end of ordered liberty. It would surrender popular sovereignty. You can never make a Soviet out of a Supreme Court, hedged on all sides; nor a Bourbon oligarchy out of a Federal judiciary lacking a single affirmative power of enslavement. But you can make any sort of a monster, suited to the ruling passion, out of a legislature or an executive which can be supreme above all things and all men. Even in pursuit of desperately wanted security, let not the warning of Benjamin Franklin be forgotten: "Those who seek security at the expense of liberty will probably lose both."

Impatience with the Constitution and the Supreme Court is no novelty. It is a recurrent phenomenon. We are a volatile people. We are proverbially irked by barriers even when they mark safety zones. But we usually come to our senses before it is too late. Each generation must suffer the same inflamatory declamations. But it has been our blessing that sanity has recuperated in time. Remember this from the Federalist Papers:

"Considerate men should prize whatever tends to fortify the courts; as no man can be sure he may not be tomorrow the victim of a spirit of injustice by which he may be a gainer today."

Thus the great South which originally was chief critic of descisions amplifying Federal power turned to the same Court in reconstruction carpet-bag days and gratefully gained protection against an improper exercise of this same Federal authority carried to excess. Thus, too, when labor unions were shocked in 1908 when the Court found that a labor boycott violated the Sherman Act and proclaimed it an evidence of the servility of the Bench to "big business," they forgot how equally shocked "big business" was in 1897 when the same Court found that "railroad pools" were illegal under the same act. Other examples are legion. Every anticonstitutional communist, when snatched from his soap box, appeals to the Constitution for his ultimate protection.

Nevertheless the Supreme Court—which is to say the articulate Constitution—has been periodically under fire. Ever since the convention of 1787 a zeal frequently more ardent than enlightened has gnawed at the vitals of this dominant charter. The apparent target has been the courts. The real target has been the Constitution itself, because, as James Madison said, the Constitution without the Federal judiciary would be "as much of a mockery as a scabbard put into the hands of a soldier without a sword in it."

Another group of clashes has been stirred by exercise of Supreme Court power to declare acts of Congress unconstitutional. The late Senator Beveridge, writing of Chief Justice Marshall who originally announced the decision vindicating this power, said:

"This supremacy of the written Constitution over statute law, and the authority of the Federal judiciary to act as arbiter in a clash between the two, is wholly and exclusively American. It is America's original contribution to the science of law."

But the contribution has precipitated periodical efforts to escape this greatest of our checks and balances. A successful raid upon the Supreme Court's appellate jurisdiction actually succeeded in 1868, but the power was restored 17 years later—another proof that America declines to lose her head indefinitely. There have been many kindred attempts. For example, we faced it, in paraphrase in 1912, when a novel idea proposed "the recall of judicial decisions."

But none of these infringements has taken hold. The power still stands—not the power of nine members of the Supreme Court to defy the President and Congress; but the power of the Constitution to insist that no President or Congress shall exercise any authority not granted to them by the people. It is the vindication of the power of the people.

Those who would strip the Supreme Court of this power have thin justification for their impatience when the whole record is candidly confronted. In 146 years Congress has passed 24,016 public acts, and only 59 have been held unconstitutional. The score is 24,016 to 59! Yet the 59 are magnified into frequent excuse to assault the Court's jurisdiction. The fact that many of these adverse opinions concentrate in our last two innovating years is less reason to attack this jurisdiction than to challenge these immediate trends as being hostile to American institutions. It calls for more rather than less vigilance.

Under lash of temporary disappointment or impatience, we may flare into thoughtless echo of these old demands for revolutionary change. But second thought, though sometimes dangerously belated, never yet has failed to restore a just regard for the amazing constitutional structure which makes us what we are.

I do not argue against exercise of the right to seek constitutional change by the ordained process. I only appeal to the people not to yield lightly to the demands of

Con continued on page 307

Sisson, *Cont'd*

modern needs. It is an old trick of the reactionaries, of those who have long fattened on special privilege, to arrogate to themselves the sole responsibility of defending established forms such as the Constitution. They profess great fear that those who would show that the Constitution is flexible enough to meet modern needs, if rightly interpreted, may elope with our beloved Constitution, while all the while they are endeavoring to keep her shackled and confined in a dungeon.

Did the framers of our Government believe that our people are not to be trusted to govern themselves? Yet the argument of those who claim the existence of a constitutional sanction for judicial nullification presupposes just this. And so with those who contend that the judicial nullification or veto is necessary in our system of government.

In summary, I stand upon the following propositions:

1. That the exercise by the Supreme Court in any suit of the power to declare an act of Congress unconstitutional, whether between private parties or otherwise, is in itself not warranted by any power conferred in the Constitution, either expressed or implied; and, therefore, such power does not legally exist under our Constitution or scheme of government.

2. That the power of judicial veto is not necessary in our scheme of government and ought not to exist.

3. That its exercise by the Supreme Court has resulted not in protecting the States or the people in their rights, but, on the contrary, has been harmful to our scheme of government and has lessened the respect of our people for their Government and Constitution and their support thereof.

4. That the remedy is that together with whatever necessary amendments clarifying the welfare clause of the Constitution or extending the national powers where needed to meet the conditions of modern times, there should be a restatement by an act of Congress of its own legislative powers, as well as of the jurisdiction of the Supreme Court with respect to its power to pass upon the constitutionality of acts of the legislative branch of the Government.—*Extracts, see 4, p. 320.*

▼

by Hon. Robert T. Ramsay,

U. S. Representative, West Virginia, Democrat

★ *Representative Ramsay argues that the framers of the Constitution intended to limit the jurisdiction of the Supreme Court to judicial cases and cites statements of early American statesmen in support of his position.*

It is claimed by those who support the theory of court determination of acts of Congress that those who oppose such application of power are opposed to the Constitution and seek to destroy our courts of justice.

To my mind, this is a gratuitous insult to a great mass of splendid lawyers and students of our jurisprudence, who assert that the Court's duty is to interpret the law, and not seek to form the law by the veto of legislation, because the power to interpret the Constitution is the power to make the Constitution.

Speaking for myself, I not only respect but revere our splendid courts who have done so much to aid the great cause of liberty and freedom of the American people.

I realize that in a great republic like ours that the confidence of the people in their courts and their laws reposes the sure and certain assurance of the perpetuity of our institutions.

Since the foundation of the great American Republic there have been two lines of thought uppermost in the minds of American statesmen.

Did the fathers of our country have in mind the general welfare of the whole people when writing the Constitution or did they have in mind the restriction of the general welfare whenever this great motive would conflict with the right to own or control property?

The founders of my political party and faith claim that the "preamble" of the Constitution meant what it said, and that all forms and action of government should be diverted and used to promote the general welfare of the people. Therefore they held that the judiciary should have no part in declaring the kind and character of laws Congress should enact, nor should the courts have any right, power, or privilege to declare any act or acts of Congress void.

Those opposed to this view of Government claim that the preamble of the Constitution meant nothing and could not be looked to in deciding upon the acts of Congress, and unless specifically authorized by the Constitution, Congress has no power to legislate.

If the Supreme Court had been so careful in marking out its powers to so adjudicate, under specific authorization, under the Constitution, this conflict would never have occurred, because the Constitution in none of its provisions authorizes the courts to hold any acts of Congress void and unconstitutional.

Today we are, in the final analysis, governed by a theory of government that was supposed to have died with the Federalist Party, but we now feel the dead and withered hand of Alexander Hamilton, directing through our Supreme Court the policies of every administration, regardless of which political party may be in power.

The decision of the Court in the Marbury case was the first declaration of the right of the Supreme Court to declare acts of Congress void. This decision was the most brazen judicial announcement of a political faith ever made by any body of men in this country. This opinion merely set forth the principles of federalism as announced by Hamilton. It was an obiter dictum opinion, because the Court first announced it did not have jurisdiction, then went on to say what the Court would have decided, if it had jurisdiction. Upon this opinion, rendered without authority or citation, the Court has built up its theory of vetoing and outlawing acts of Congress, thereby

Pro continued on page 308

Vandenberg, *Cont'd*

an impassioned moment, nor to be misled by any specious plea that the Constitution is an instrument of malign repression deserving popular contempt. Truth is exactly otherwise. The Constitution protects the people and preserves to them sole sovereignty. The people victimize themselves if they part with this bulwark.

Congressmen are chosen for 2 years; Presidents for 4; Senators for 6. They come and go—hailed today, repudiated tomorrow. The Constitution is our one continuous foundation. If it ever becomes similarly transient we shall trade granite for sand as the base of our institutions. This does not suppose a superiority of the judicial to the legislative or executive power. It supposes only that the power of the people is superior to all three. The Constitution is the people. The people never should mediate their own dethronement, or hasten to the defeat of their own authority.

This is not Russia—yet. This is not Europe. This is still the Republic of the United States. Why? Because of the Constitution. Those who smirk at it as a "horse-and-buggy" antiquity conveniently ignore the shining fact that under it we have builded a larger relative happiness and prosperity than any other nation in history.

For every credential urged in behalf of the new experimental era a thousand benedictions may be cited to the honor and the glory of the traditional American Constitutional institutions. If the time finally has come for change, let the need and the wisdom of it be proven beyond shadow of a reasonable doubt. Let no passing fancy, no fickle emotion, no balked ambition drive us to hasty reprisals upon our greatest asset. The remorse and repentance of tomorrow will be poor consolation for the unthinking errors of today.

It is no idle resurrection of a rhetorical phrase; it is no empty recollection of Lincoln loyalties; it is simply the iron truth that it is the integrity of the Constitution of the United States which alone warrants that "government of the people, for the people, and by the people shall not perish from the earth."—*Extracts, see 7, p. 320.*

▼

by Hon. Theodore Christianson,

U. S. Representative, Minnesota, Republican

★ *Representative Christianson argues that the framers of the Constitution did not form a National Government but a Federal Government, distinctly reserving certain rights to the states and the people and gave to the Courts alone the power to interpret the laws.*

WE find that after the Constitution of the United States was adopted this situation existed: First, all powers except those which the people had delegated remained in the people; second, those powers which the people had given to the States remained in the States unless and until surrendered to the Federal Government; and, third, the Federal Government had only such powers as had been surrendered to it by the States or delegated to it by the people. The Federal Government was one of definitely limited and specifically enumerated powers. It is important to remember that it was not a national government, but a Federal system of government that the founding fathers established.

In order to safeguard the liberties of the people, the framers of the Constitution set up a system of checks and balances. They distributed the powers of government among three separate departments—the legislative, the executive, and the judicial. To Congress, and to Congress alone, they gave the power to pass laws. To the President, and to the President alone, they gave the authority to enforce laws. To the courts, and to the courts alone, they gave the responsibility to interpret and apply laws in cases in which the rights of litigants were in question.

There was a reason for this sharp demarcation between legislative, executive, and judicial functions. The framers of the Constitution knew history. They knew that at one time the king's will was law; they knew that he not only legislated, but in many instances heard and decided cases. They knew that the struggle for liberty had in the main been one to transfer the power to make laws from the king to the representatives of the people, and the power to interpret and apply laws from the king to an independent judiciary. The framers of the Constitution were determined to preserve the gains the people had won by hundreds of years of struggle, and therefore they were careful to enumerate the separate powers of the three departments of the Government.

Furthermore, recognizing that the tyranny of the many may be just as oppressive as the despotism of the few, the fathers wrote into the Constitution a bill of rights. They fixed boundaries beyond which the people themselves could not go in transgressing upon the freedom of the individual.

In his "Republic" Plato had declared that the "chief object in the construction of the state is the greatest happiness of the whole and not that of any part." While the authors of the American Constitution also recognized the importance of promoting the "general welfare," they were wiser than Plato in that they knew that the "greatest happiness of the whole" is best served when every man who is a part of the whole is secure in the possession of certain rights and liberties which a capricious temporary majority cannot take away.

The ideal society is one which recognizes that it exists for men and not men for it; which gives to every person freedom and opportunity to achieve to the full measure of his capacity, and which seeks in the development of the individual character the fulfillment of its highest purpose.

The men who built this Nation did not, like some of their decadent sons, inveigh against "rugged individualism." On the contrary, they gloried in it. They followed no cult of mediocrity, they sought no dead leveling of society. They did not waste their time dreaming of an economic order in which every man should have the same amount of income, live in the same kind of house, wear the same kind of clothes, own the same number of acres,

Con continued on page 389

placing itself in the position of dictating the political policies of this country. Such decisions of our courts are mere political opinions and not judicial decisions, and are wholly unauthorized by the Constitution, laws, and traditions of our form of government.

When we realize that no court in Great Britain has dared declare any act of Parliament unconstitutional in the past 200 years, and that neither France, Belgium, Germany, nor Italy have any court empowered to set aside the laws of their Parliament, we stand aghast at it all; and as we realize that every court in America, even every justice of the peace, can set aside the acts of Congress and declare the political course our political parties must pursue, we shudder and wonder what the outcome will be.

How long will the American people permit the courts of America to defeat the expressed will and intent of the people of this country by avoiding and destroying the laws that people are demanding? By a decision of 5 to 4, will they continue to permit this Court to deny their Legislature the right to correct the evils and abuses of the ownership of property that have for the past 50 years dictated the course of legislation at the expense of human welfare? The courts apparently will not, or cannot, recognize the changing social needs of the United States.

To determine whether or not those of us who deny the power of the Court to nullify acts of Congress are radical and opposed to the Constitution, let us for a moment review the expressions of our Great American statesmen of the past.

The Constitutional Convention held in 1787 four times refused to adopt a resolution that would have granted to the Supreme Court the right to declare acts of Congress void or unconstitutional. (See Reports of Federal Convention, by James Madison, pp. 51, 406-407, and 475.) The last statement on this subject in said record, at page 475, written by Madison himself, reads:

It was generally supposed that the jurisdiction given (Supreme Court) was constructively limited to cases of a judicial nature.

It was further argued by Madison and others that the Constitution did not grant the right to such Court to declare acts of Congress void.

In discussing this question James Madison said:

I beg to know upon what principle it can be contended that any one department draws from the Constitution greater powers than another in marking out the limits of the powers of the several departments. Nothing has yet been offered to invalidate the doctrines that the meaning of the Constitution may as well be ascertained by the legislative as by the judicial authority.

Thomas Jefferson, in writing to Mrs. Adams on September 11, 1804, wrote:

The opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the legislature and executive also in their spheres, would make the judiciary a despotic branch.

In a letter written by Jefferson to Mr. Johnson on June 12, 1823, discussing this same question, he stated:

There must be an ultimate arbiter somewhere. True, there must; but does that prove it is either the Congress or the Supreme Court? The ultimate arbiter is the people of the Union, assembled by their deputies in convention at the call of Congress or of two-thirds of the States.

Charles Pinckney, one of the signers of the Constitution, says in discussing this subject:

On no subject am I more convinced that it is an unsafe and dangerous doctrine in a republic ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of laws or any act of legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution and will not, I hope, long have any advocates in this country.

President Jackson, in discussing McCulloch against Maryland and of Osborn against United States Bank, in a message to Congress said:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears he will support it as he understands it, and not as it is understood by others.

It is as much the duty of the House of Representatives, or the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage, or approval, as it is of the Supreme Court, when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the executives when acting in their legislative capacities.

Abraham Lincoln, in his first inaugural address as President of the United States, said:

The candid citizen must confess that if the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

Justice Clark, of the Supreme Court, in discussing this question in the Ninth American Bar Association Journal —October, 1923, page 691—said:

"It is no new suggestion that if the Court would give real and sympathetic effect to this rule by declining to hold a statute unconstitutional whenever several of the Justices conclude that it is valid—by conceding that two or more being of such opinion in any case must necessarily raise a 'rational doubt'—an end would be made of 5-to-4 constitutional decisions and great benefit would result to our country and to the Court. To voluntarily impose upon itself such a restraint as this would add greatly to the confidence of the people in the Court and would very certainly increase its power for high service to the country. Anyone at all acquainted with the temper of the people in this grave matter must fear if the rule is not observed in some such manner a greater restraint may be

Pro continued on page 310

Christianson, *Cont'd*

and maintain the same bank balance as every other man. They recognized that nature, which never gives to any two trees the same foliage or even to any two blades of grass the same structure and form, does not invest any two men with the same capacity. They knew that some, by reason of greater foresight, more talents, and better self-control inevitably outstrip their fellows. When the founding fathers said that "all men are created equal," they did not refer to equality of ability or wealth or position, but to equality of right and opportunity.

So today, if we follow the fathers and heed the Constitution which they wrote, we shall seek the answer to our social questions, not in a dead leveling of society, but in the removal of artificial handicaps and the withdrawal of special privileges; we shall find the solution of our economic problem, not in tearing down our neighbor's house, but in building one of our own. There is enough sporting blood in the average American to make him willing to take his chance if he is given a fair field where there are no favors.

Our ideal of America was well expressed by James A. Garfield when he said that "while European society is stratified like the rocks in the earth, ours is stratified like the ocean, where from the sternest deeps any drop may rise to glisten on the highest wave that rolls." Such a society we can have under the Constitution, without confiscation, without regimentation, and without destroying our social and economic order.

I have sought to show that the Constitution adopted by the fathers set up a Governmental system in which all powers not granted to the Government were reserved to the people; in which the States were as essential and important as the Nation; in which the powers of government were divided among three departments, none of which might encroach on either of the other two; and in which the individual had rights which no Government, State or Federal, could take away.

Is that system adequate for today, or should it be either scrapped or so modified as to alter its framework substantially?

Personally, I am not ready to concede that there is any present economic or social problem that cannot be solved without fundamentally changing the Constitution. I say "fundamentally," for I freely admit that amendments may properly be adopted from time to time in the future, as they have been in the past, to meet situations due to changing conditions. The very fact that the Constitution prescribes the manner in which it may be amended shows that it was intended that it would be amended. But what I would especially stress is that while we may find it necessary to make occasional adjustments, we should approach with caution all proposals to abridge individual liberty or to alter the essential framework of the Federal system.

Recently there was introduced in the House of Representatives an amazing resolution. It proposed a constitutional amendment providing that "the Congress shall have power to make all laws which in its judgment shall be necessary to provide for the general welfare of the people."

I prefer to believe, as charity should prompt us to do, that the author of that resolution did not realize the full import of the language which he used: "The Congress shall have power to make all laws which in its judgment shall be necessary to provide for the general welfare of the people."

If that amendment were adopted, Congress could pass any law, howsoever it conflicted with provisions of the Constitution, that in the opinion of a majority of those temporarily sitting in the Senate and the House of Representatives would be for the general welfare.

A mere statute, enacted by representatives of the people might supersede the fundamental law adopted by the people themselves. Accordingly an act of Congress would have greater validity than the Constitution. The net effect, of course, would be that we would have no Constitution.

Every provision of the Bill of Rights would be subject to abrogation. If Congress decided that it was for the welfare of the people to suspend the right of free speech, it could suspend that right. If Congress decided that it was for the welfare of the people to outlaw newspapers whose editorial policy was in conflict with the policy of the party in power, it could destroy the freedom of the press. If a majority of the Members of Congress held the view that has been officially accepted in one part of the world, that "religion is the opium of the masses," they could give effect to that view by prohibiting the free exercise of religion. If they believed that communism is preferable to individual ownership of property, they could confiscate any farm, any factory, and even any home in America.

Under such a provision Congress could usurp every power of the States; it could tear down State boundaries and destroy the Federal system. It could change the tenure and the manner of the election of its own Members. It could divest the courts of their jurisdiction. By the two-thirds vote required to override a veto, it could pass a law depriving the President of his right of veto. It could strip him of his power, or if it wished, make him a dictator. The adoption of the proposed amendment would make it possible for Congress to do in the United States everything that Mussolini has done in Italy, or Hitler in Germany.

If you think I have found in the language a meaning that is not there, let me read it again: "The Congress shall have power to make all laws that in its judgment shall be necessary to provide for the general welfare of the people."

A second resolution now pending in Congress calls for a constitutional amendment providing that "no court of the United States, or of any State, shall declare unconstitutional or void any law enacted by the Congress of the United States. All laws of the United States shall remain in full force and effect throughout the United States until repealed by the Congress of the United States, or until vetoed or repudiated by the action of the legislatures of three-fourths of the States. The tenth amendment of the Constitution of the United States is hereby repealed."

What is the tenth amendment which the author of this resolution would repeal? "The powers not delegated to the United States by the Constitution, nor prohibited by it

Con continued on page 311

Ramsay, *Cont'd*

imposed upon the Court by Congress or by the people, probably to the serious detriment of the nation."

Of course, I am aware that the courts and the legal profession contend that the courts have an inherent right to declare acts of the legislative branch of the Government void as a professional dogma or a matter of faith rather than reason. But may I not observe that while this right in question has long been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall in the Marbury case, and if the argument of such a distinguished jurist is found to be inconclusive and inconvincing, it must be attributed to the weakness of his position and not to his ability.

The Constitution is a collection of fundamental laws, not to be departed from in practice, nor altered by judicial decisions. Therefore, if the courts assert this right, instead of resting on the claim that it has been universally assumed by the American courts, they ought to be prepared to maintain it on the principles of the Constitution.

I therefore maintain that in this country the powers of the judiciary are divisible into those that are political and those that are civil.

The political powers of the judiciary are extraordinary and are derived from certain peculiar provisions in the Constitution, from the common fountain of all political power.

On the other hand, its civil powers are its ordinary powers, existing independently of any grant in the Constitution. But where government exists by virtue of a written constitution, the judiciary does not derive from that circumstance any other than its ordinary and appropriate powers.

Our judiciary is constructed upon the principles of the common law. In adopting the common law, we take it with just such powers and capacities incident to it, at the common law, except where there have been express changes made by our Constitution and enacted law. With us, the people, through their Constitution, have seen fit to clothe Congress with sovereignty and power, to pass and enact laws, and denied this right to other branches of the Government.

It must be conceded, then, that the ordinary and essential powers of the judiciary do not extend to the annulling of an act of Congress. Nor does it follow, because the Constitution did not invest this power in any department of our Government, that it belongs to the judiciary, and I take it that this power could not rest in the judiciary without producing a direct authority for it in the Constitution, either in terms or by the strongest implication from the nature of our Government, without which, this power must be considered as reserved for the immediate use of the people.

The Constitution contains no practical rules for the administration of law by the courts, these being furnished by the acts of ordinary legislation enacted by Congress, who are exclusively, with the President, the representatives of the people.

The Constitution and the right of Congress to pass a certain act may be in collision, but is that a legitimate subject for judicial determination? If it is, the judiciary must be a peculiar organ to revise the proceedings of Congress and to correct its mistakes. And where, oh, where, are we to look for this proud prerogative in the Constitution?

Viewing it from the other angle, what would be thought of an act of Congress declaring that the Supreme Court had put the wrong construction on the Constitution in the N.R.A. case, and that the judgment ought not to be reversed?

I can hear now the howls of usurpation of judicial power.

The passage of an act of Congress is an act of sovereignty, and sovereignty and legislative power are said by Blackstone to be convertible terms.

It is the business of the judiciary to interpret the laws and not to scan the authority of the lawgiver. If the judiciary has the power to inquire into anything other than the form of enactment, where shall it stop? There certainly must be some limitation to such an inquiry. Those who claim this right for the judiciary, claim the legislative branch have no right of legislation, unless specifically granted by the Constitution. Therefore, if the authority to pass certain legislation is not found in the Constitution, such acts are not the acts of the people—but of the Congressmen themselves. But this is putting the argument on bold ground; to say that a high public representative of the people themselves shall challenge no more respect in the passage of legislation than a private individual must be rejected by every fair mind.

The further argument is made that when the Supreme Court holds an act of Congress void, it must acquiesce, although it may think the construction of the judiciary is wrong. But why must it acquiesce? Only because it is bound to show proper respect to the Supreme Court, which it in turn has a right to exact from the Supreme Court. This is the argument.

But it cannot be contended that the Congress has not, at least, an equal right with the judiciary to place a construction on the Constitution, nor can it be said that either are infallible; nor that either ought to surrender its judgment to the other. Certainly the framers of our Government never intended that the legislative and judiciary branches of our Government should ever clash upon the construction of our Constitution, yet we know this has occurred time and again during the history of our country.

What I am trying to say is that the judiciary, if at all possible, should yield to the acts of Congress the same respect that is claimed for the acts of the judiciary.

The great number of cases that have been decided by the court by a decision of 5 to 4 clearly illustrates that repugnancy to the Constitution is not always self-evident, and that to avoid them requires the act of some tribunal competent, under the Constitution—if any such there be—to pass upon their validity.

The judiciary was not created by the fathers of the Constitution for that purpose. But in theory all the organs of government were to have equal capacity, or if not equal, each was supposed to have superior power only for those things which peculiarly belong to it, and as

Pro continued on page 312

Christianson, *Cont'd*

to the States, are reserved to the States, respectively, or to the people."

If the tenth amendment were repealed the States would have no rights which the Congress would be bound to respect. The Federal Government, instead of being one of limited powers would become one of absolute power. The States if it suited the whim of a congressional majority, might be made merely geographical units, existing for the sole purpose of electing Congressmen. Such an amendment would not only repeal the last of the 10 articles of the Bill of Rights, but would place in Congress the power to nullify the other nine. Against the tyranny of any law the citizen could not assert any constitutional right, for no court would have jurisdiction to hear a case in which the constitutionality of any act of Congress was challenged.

It is difficult to believe that even the stress of economic necessity, serious as it is, would ever induce the people even to consider a proposal designed to destroy so completely the American form of Government.

Of late it has become a popular pastime among those who have been frustrated in their effort to reach Utopia by a legislative detour to challenge the right of the Supreme Court to declare acts of Congress unconstitutional. Even the President of the United States, at a press conference that has already become historic, in an unguarded moment gave utterance to some opinions which he may have occasion to regret.

The right and duty of the Supreme Court to consider the validity of the laws it is called upon to interpret and apply arise out of the very nature of our constitutional system. We have two kinds of law, constitutional and statutory, the one springing from the people themselves, the other from their legislative representatives. The Constitution is, in effect, a power of attorney given by the principal, the American people, to the agent, the Congress of the United States. The acts of an agent, if within the terms of the power, are binding upon his principal; if not within the power, they have no validity. We have a Constitution which is the supreme law of the land, and statutes which are law only insofar as they do not conflict with the supreme law.

A and B are engaged in litigation. A asserts his right under an act of Congress; B asserts his under a provision of the Constitution, with which the statute is in conflict. The case comes to the Supreme Court for a final decision. Shall the Court divide in favor of A, who relies on a mere statute, or in favor of B, who rests his cause on the supreme law of the land? If the Court decides in favor of B it invalidates the statute and sustains the Constitution; if it decides in favor of A it sustains the statute and invalidates the Constitution. When faced with the dilemma of having to invalidate either the statute or the Constitution, what should the court do? To ask the question is to answer it.

There are those who, while chafing under judicial decisions they don't like, do not care to go so far as to deny the Supreme Court the power to declare acts of Congress unconstitutional, but demand that the Constitution be so amended that a two-thirds vote would be necessary for a judicial veto. Pointing to occasional 5-to-4 decisions, they decry the fact that it is possible for "one old man" to nullify the action of a majority of both the House and the Senate, and of the President as well. The argument is so plausible that it wins many supporters, but it is wholly specious.

It is important to remember that the issues upon which courts are asked to pass are not moot questions, but questions involving the rights of litigants. If the Constitution were so changed that it would require a 6-to-3 instead of a 5-to-4 decision to invalidate an act of Congress, the rights of litigants who challenged a statute would be impaired. Thus, in the hypothetical case I have cited, B, who rests his claim on the Constitution, would have to convince 6 of the 9 judges that he was right; A, who relies on the statute, would have to win only 4 to his side. In other words, A might win the case although 5 of the 9 judges thought he was wrong. Surely this would be not only a repudiation of the generally accepted principle of the majority rule, but a gross denial of justice.

There is nothing undemocratic in the procedure under which a majority of one may invalidate an act of Congress. One vote frequently decides the fate of a bill, or of an amendment thereto, in the House and the Senate; and a bill passed by both Houses is often killed by one man, the President of the United States. Those who argue that a two-thirds vote should be required to invalidate an act might with equal consistency demand that it should require a two-thirds vote in both Houses of the Congress to pass it.

Whenever it is thought desirable to amend the Constitution, let those who ask for an amendment submit their proposal in the manner provided in the Constitution to the people from whom the Constitution itself issued. Let there be no amendment by indirection, whether through the device of unconstitutional legislation or by tampering with the composition of the Supreme Court.

Ratification might conceivably be accomplished by a majority of one, either in the legislature or in a constitutional convention, in each of 36 States. Those States might be the smallest—those which in 1932 supplied in the aggregate only one-third of the total vote. In each of those States the majority members of the legislature or convention might conceivably be elected by a bare majority, or even by a mere plurality, of the electors. Therefore, inasmuch as those voters who constituted a bare majority in one-half of the legislative districts in States casting one-third of the Nation's vote might decide the issue, it is at least theoretically possible for a little more than one-twelfth of the voters in the United States to change its Constitution.

While it is readily admitted that it is quite improbable that 40,000,000 votes would ever be so distributed that three and one-third million would bring about a change in the fundamental law of the land, the figures I have presented show that organizing the electorate toward that end is not an insuperable task.

Men who are influential in the Nation are at the present time advocating a change in the commerce clause of the Constitution.

Although such a change would not have the sweeping

Con continued on page 313

Ramsay, *Cont'd*

legislation peculiarly involves the consideration of those limitations which are put on the law-making power; and the interpretation of laws, when made, involves only the construction of the laws themselves, it follows that the construction, in this particular belongs to the Congress, which ought, therefore, be taken to have superior capacity to judge the constitutionality of its own acts.

The very definition of "law," which is said to be "A rule of civil conduct prescribed by the supreme power in the State," shows the intrinsic superiority of the Congress.

It will be said the power of Congress also is limited by prescribed rules. It is so. But it is the power of the people, and sovereign as far as it extends.

The foundation of every argument of every advocate of the judiciary to declare acts of Congress void rests upon the oath taken by the judiciary upon entering their office. Neither the oath of such officer nor his official duty contemplates an inquiry into the authority of Congress.

The fallacy of the argument that courts in approving acts of Congress adopts them as their own leads some of us to believe that this alone requires and compels the court to pass upon the constitutionality of acts of Congress, whereas the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the Constitution, which is the fault of Congress, and upon it the responsibility rests.

The relief from such legislation rests entirely with the people, and I firmly believe they would see to it that no law would be permitted to stand or remain in our statutes that was a flagrant violation of their Constitution.—*Extracts, see 3, p. 320.*

▼

by Hon. David J. Lewis

U. S. Representative, Maryland, Democrat

★ *Representative Lewis cites legal authorities in support of his argument that the power to nullify an Act of Congress is purely a political power and not a judicial power and should not be exercised by a Court of Law.*

We are face to face with the gravest question presented in my experience in Congress. An unparalleled economic situation has dictated that Congress should do something. A coordinate department of the Government has just told us we may not.

When two years ago we first faced this depression we found that the separate States, because of geographical limitations, were organically incompetent to act. We then took national action, as any other nation might do. The refusal of the courts, a coordinate department of the Government, to apply the law has produced such a crisis that Representative Sisson, of New York, has offered a resolution asking the House to ask the Judiciary Committee to advise us—

Whether the legislative power of the Congress does or does not extend to the enactment of laws making provision for the general welfare of the United States and to insure the domestic tranquillity.

Whether the authority of the courts of the United States, including the Supreme Court, extends to the annulment of statutes duly enacted by the Congress to provide for the general welfare of the United States and insure the domestic tranquillity.

Let us not mistake or neglect the import of this resolution. Does the United States possess a national parliament like other nations, of which surely it stands in like need? The questions the Sisson resolution raises of the competency of the nation under the Constitution to deal with national subjects involving the general welfare and tranquillity of the American people command immediate consideration.

Each department "in their own sphere of action," says Jefferson. That is, Congress enacts the law against piracy, but only the courts can punish the pirate. Congress alone can declare war, but only the Executive can conduct it. Congress can enact a bankruptcy law, but only the courts can declare a man a bankrupt. A word about the courts in general. It is my view that they are indispensable. The legislature could not discharge their function; should it assume to try a controversy between citizens according to legislative procedure, only confusion and injustice could result. Only the courts' methods are sufficiently adapted to such work. This is proved by all the experience of mankind. But the same experience indicates that the courts are unfitted to determine national policy or to make laws for a people. Long before our Constitution court and legislative functions had been rigorously separated. I have no patience with the lawmaker who would invade the judicial field. I have no more for the nullifying acts of courts.

"Somebody should determine whether an act of Congress is repugnant to the Constitution," it is argued; "then why not the judge?" Answer, "Why not the House of Representatives, the Senate, and the President, who are sworn to support the Constitution and who speak the will of the people?" This was the answer made by the Convention which formed the Constitution. And their reasons are convincing enough to the thoughtful.

The first reason is that—

(a) The Constitution is not a deed or mortgage, a contract or private document, usually supplied with sufficient detail to enable the judge to interpret it fully and where the interpretation of the judge is of consequence only to the litigants concerned.

(b) Conversely, the Constitution is a statesman's document, composed largely of abstract phrases, phrases which of necessity, in such an abbreviated instrument, are of general but indeterminate significance; phrases whose interpretations call for whole statutes which in turn call for the exercise of the lawmaker's discretion. Such general phrases are like the subject index of a book and call for defining statutes as the book index calls for a book.

Hence, while in disputed cases the private or lawyer's document calls for judicial interpretation, the statesman's

Pro continued on page 314

Christianson, *Cont'd*

consequences of the proposals I have heretofore enumerated, it would, in view of the preponderance of the Nation's economic interest, hold possibilities for disturbing the balance between the State and national jurisdictions that should suggest caution. Any general shifting of responsibility in relation to intrastate commerce from the State capitals to Washington might lead to consequences that would be regretted.

If authority is sought for the enactment of a national minimum-wage law, or for the enforcement of codes of fair competition, let each proposal be separately stated in restrictive terms, so that the people may know definitely the extent of the powers they are asked to delgate to Congress.

Then, whatever the decision, whether wise or unwise, we shall all abide by the result, recognizing that this is a country in which the will of the people as expressed in the Constitution is the supreme law of the land.

Some there are who have declared that the "horse and buggy" Constitution adopted in 1787 is outmoded and that we should exchange it for a 1935 model. Those who offer the suggestion and thereby inferentially offer themselves for the role of Constitution maker cannot claim the merit of modesty.

They are bold men who would undertake to write a new basic law to take the place of the one framed by that galaxy of statesmen that by the grace of God or by an unusual fortuity was assembled at Philadelphia 148 years ago this summer.

I am free to confess that no such group of men could be recruited from the House, I question whether it could be assembled from the Senate, and I doubt whether it could be constituted even from Felix Frankfurter's class of precocious sophomores. For one, I would not be willing to exchange the Constitution of George Washington, Benjamin Franklin, and James Madison for any brain child of Donald Richberg, Rexford Tugwell, and Hugh Johnson.

We who live today are trustees for the future of America. In our responsibility we must not fail.—*Extracts, see 6, p. 320.*

▼

by Hon. Joseph A. Gavagan,

U. S. Representative, New York, Democrat

★ *Representative Gavagan argues that if the Supreme Court were deprived of its power to declare Acts of Congress unconstitutional, Congress would become the most powerful legislative body in the world and the Constitution would cease to exist.*

THE general argument against the Supreme Court's powers, to sum up, claims that Congress represents the sovereign will of the Nation and that therefore any act passed by Congress cannot and should not be invalidated by the Court. A nodding acquaintance with the United States Constitution is sufficient to refute such contention in anyone's mind. The Constitution, not Congress, represents the sovereign will of our people. That sovereign will is expressed only through the Constitution, and Congress expresses only the will of the people under the Constitution. It has been recognized since 1789 that Congress expresses the will of the people in the ordinary course of events, but that that expression is always controlled by the sovereign will of the people, expressed, and only expressed, in the fundamental law of the Constitution.

Furthermore, it is quite elementary, but it seems necessary to repeat, that this country is made up of a Union of 48 sovereign States, and superimposed thereon there exists a sovereign Federal Government. To the Federal Government, under the Constitution, are delegated certain powers, and to the individual State governments are reserved the remainder. Again, under the Constitution, to the President are delegated certain powers, to the Congress others, and to the judiciary still others. One need not stop long to realize that under this system an attempted exercise of power by the President may overlap that of Congress, and that of Congress the Supreme Court, and conversely; and that, again, an attempted exercise of power by the Federal Government may overlap that of the States, and those of the States overlap those of the Federal Government. To continue the smooth working of the Government under such an arrangement and division of functions, it is perfectly obvious that a power must be lodged somewhere in the Government to define the limits of the powers of these various organs and to say where the powers of one begin and of another end.

If it were not for the Supreme Court the State governments could arrogate to themselves powers clearly only within the jurisdiction of the Federal authority, and conversely, the Federal Government could reach out throughout the land and assume powers clearly reserved to the States. Worse yet, if it were not for the existence of this power in the Court, the President could assume to himself powers reserved to the Congress, and, conversely, Congress could assume powers of the President or the courts. The President could, for instance, make Executive orders of any sort on his own volition and give to them the effect of absolute statutes.

The people elect the President, but no one has yet had the temerity to assert that they elect the President to make the laws. Even a school boy knows the President is supposed only to execute the laws that are made by Congress. Going further, the Congress, which, under the Constitution, is limited to certain very definite powers, could pass laws of any sort whatsoever if it were not for the existence of the judicial veto in the Supreme Court. Congress would become even more omnipotent than the British Parliament. It may be admitted here that no court in England would invalidate an act of Parliament, despite what Coke said in Dr. Benham's case, that "an act of Parliament against common right and reason would be adjudged void." But it suffices to say, with respect to the British Parliament, that safeguards exist in England upon the

Con continued on page 315

document needs to be interpreted in the legislative laboratory where and when the statute is being made.

The second reason is—

(c) The interpretation needs be finally made by the Congress and President before the law goes into operation because the life or security of the country and of the citizen may depend upon the immediate and unconditional operation of the statute.

(d) The citizen is conclusively presumed to know the law. Hence he is entitled to know whether it is a law when it passes, so that he may fashion his conduct accordingly. Any veto should therefore take place before the obligations of the law attach. The Constitution has made ample protective provision for such a veto on constitutional grounds. A bill may be vetoed by a majority in the House or Senate, where it is first proposed; if not vetoed there, then by a majority in the other House; and if not vetoed by either House, then by the President. If vetoed by none of these, the people at the next election can elect a new Congress to repeal the act. Here are three successive occasions when responsible officials, sworn to support the Constitution, elected by and responsible to the people, may, as they often do, exercise a preventive veto. The unwise or the unconstitutional bill is thus stopped before obligations are fixed on the citizen. From 1789 to 1857—68 years—this kind of veto alone obtained. It surely sufficed the Republic through its period of greatest development, a chapter of changes and of progress, I venture to affirm, without parallel in the history of nations.

The lawsuit veto by the method of nullification fails to provide the protection for the country and citizen given by the veto provided in the Constitution; because—

First. It can only be exercised if and when some interested litigant invokes it in the courts.

Second. Meanwhile contingent obligation attaches to all citizens, conditional upon some litigant successfully attacking the law.

Third. The statute becomes a mere order nisi dependent upon courthouse litigation conducted not by officials responsible to the people but by private litigants, whose approach is only individual, and not pro bono publico, as designed by the Constitution and as justly expected of the Members of Congress.

Fourth. Such a lawsuit veto does not operate ab initio on the citizen. If he has not brought suit in the courts, in many cases his effective rights may be one thing; if he has they may be wholly different, the present processing-tax situation being an example.

Chief Justice Marshall concluded his decision with the statement:

That a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

Please observe what this power signifies if thus incontinently derived by mere inference. Not only the Supreme Court, officers in the departments, and the lower courts but the humblest justice of the peace is empowered to nullify the statute before him if he thinks it is repugnant to the Constitution.

Such a case happened in my own State. A justice of the peace was trying a commercial traveler from some other State for violation of a Maryland law. He concluded that the Maryland law violated the Federal Constitution, and actually held the Maryland law void. The case went to a Maryland circuit court, where the justice of the peace was promptly reversed. The commercial traveler carried his case to the Court of Appeals of Maryland, and the justice of the peace was reversed again. The case at length reached the Supreme Court. That Court reversed our court of appeals and circuit court and affirmed the squire.

Now, mark you, not only may the justice of the peace nullify a statute under this unbridled power which carries no limitations as to who shall exercise it, but officers of "other departments are bound by the Constitution" to do so should the sworn official applying the act infer that it was repugnant to the Constitution. All judicial officers may nullify; any executive officer may nullify an act of Congress. Certainly "here is the philosophy of anarchy issuing from the fountain of the law." And anarchy it proved to be when this dictum of Marshall was first applied 57 years later in the Dred Scott decision.

A high degree of intelligence and wisdom will be freely granted the makers of the Constitution. Hence the credibility of an inference, an intention imputed to them, may be judged by the consequences it involves. Consequences of inferring such a power is that it carries all the power of the veto but carries no limitations as to the time when or the official by whom it shall be exercised. It is also a veto which may not be reversed. The Missouri Compromise Act was passed in 1820 and permitted to perform its high purpose of insuring the "domestic tranquillity" for 37 years before its veto by a divided Court in 1857. Is it conceivable that such a gathering of lawmakers would propose a veto that might be exercised by any sworn official—judicial or executive—without limit of time or opportunity to the Congress to revise the legislative mandate? If not, how can such an intention be imputed to the makers of the Constitution?

Other able judges of the time, Judge Bland, of Maryland, Chief Justice Gibson, of Pennsylvania, among them, discountenanced the Marshall view. Professor Haines, the foremost student of this subject, remarks:

Anyone who carefully considers the opinions of Judges Bland and Gibson can readily perceive that reason and logic had comparatively little weight with those who are resolutely about to make judicial review of legislation a part of the American political system.

The comment of the late Chief Justice Clarke, of North Carolina, also seems fitting:

The power to set aside or nullify an act of Congress or a State legislature is a purely political power, and is so recognized by the constitutions which give the veto to the Executive. It comes under no definition or conception of the judicial power, which is to judge between the parties to a controversy. Neither the Government nor the State is a party to these proceedings, in which its supremest power—that of enacting laws—is nullified. As claimed and exercised by the courts, it is the absolute, autocratic power, because it is irreviewable. Those whose

Pro continued on page 316

Gavagan, *Cont'd*

Parliament's powers that do not exist in this country with regard to Congress. The American Congress is in substance comparable not to the Parliament as a whole, but only to the House of Commons. In England the House of Lords may at least stay an act of the Commons for at least 2 years. Again, though it may not have been exercised since the reign of Queen Anne, the British Crown does have the power of veto over an act of Parliament. Again the British constitution, though unwritten, has in a country such as England, heavily imbued with tradition, a force almost equivalent to that of the laws of nature.

Congress in this country, if it were not for the Supreme Court, would be the most omnipotent law-making body on the face of the earth. The existing Congress could permanently legislate itself into office and prevent all future elections. If at the next election, the Republican Party by some unpredicted turn of events should attain a majority in Congress, that Republican majority could legislate the President out of office and replace him with anyone it saw fit, save for the Supreme Court. Congress could violate every single provision of the Constitution; it could, for instance, establish a State religion and disqualify all those adhering to any other belief in God from voting; it could abolish freedom of speech and of the press and permit to exist only those newspapers which expressed the ideas and demands of the dominant party; it could quarter troops in any home; it could abolish every constitutional protection against the security of the people in their persons and in their homes against unreasonable searches and seizures; it could abolish trial by jury and place a person in double jeopardy for the same offense; it could abolish completely all the principles of law which have been built up in a thousand years of strife in Anglo-Saxon history to protect the citizen and his life, liberty, and property. It could pass bills of attainder and expropriate property without compensation; it could abolish courts and constitute in place of our existing judicial system, dishonest and political star-chamber proceedings; it could restore prohibition; it could remove the right of suffrage for sex, religion, race, or any other conceivable reason. It could establish forced labor; it could abolish any branch of the Government and create any other. One could go on ad infinitum illustrating the evils and excesses which Congress could impose upon the Nation were the protective powers of the Supreme Court once removed.

It is no answer to say that if Congress exceeded its constitutional powers the people would vote its Members out of office on the next election. The people might not even get the opportunity; Congress might legislate itself into office permanently, or make illegal all political parties except the dominant one, and in any case, irreparable injury could be done before the following elections.

That this is no idle talk and does not represent the far-fetched excesses of an overactive imagination is amply illustrated by current events in other parts of the world. One has only to consider the countries of Europe to realize what can be done by a dominant political party or a successful demagogue in the way of destroying the rights of the common citizen and establishing an absolute dictatorship and tyranny over the people through the control of a legislative body with these very same rights that the opponents of the Supreme Court would vest in Congress.

The very situation that exists in Europe could come to pass in this country if Congress were once given the omnipotent powers that the opponents of the Supreme Court advocate. It is perfectly obvious that if the Court is deprived of the right and power to interpret the Constitution and to refuse to recognize any governmental act not within the Constitution, that the Constitution, for all practical purposes would cease to exist. Both in theory and in fact that document becomes but an interesting scrap of paper to be entombed in a museum. Future generations could point to it as a "classic" example of what depths a nation may descend to when popular clamor, created and steered by clever but unscrupulous demagogues is permitted to override the counsel of reasoning men. Is every lesson of our history to be thrown aside, is all that we have fought for to give security to the citizen in his life, liberty, and property, and his chance in "the pursuit of happiness" to be nullified in order that doubtful virtues of a dictatorship be established?

The dictatorship of a majority political party, be it Democratic, Republican, Socialist, Communist, or what not, is no less hateful than the tyrannies of kings or emperors.

The unfortunate part of the arguments against the Supreme Court is that they subtly ensnare the very people whom the Court is most zealous to protect—the ordinary common man in the street. Under the guise of an interest in the mass of the people and under the cloak of promoting legislation designed to promote their social and economic welfare, the opponents of the Court argue that the Court in its decisions is in effect legislating against all social reform, and therefore to achieve that very necessary reform it is necessary to abolish the Court as we know it. Whether inspired by motives of ignorance or malice, the result that these people seek to achieve would be harmful to a degree impossible to conceive. They make the argument that the Court is a reactionary body of "old men" with "horse and buggy ideas," who are more zealous to protect "property" than "life or liberty." Even if this be so, which it is not, is that any reason for abolishing protection to life and liberty, as well as to property? They argue that the Court's decisions represent in effect legislation created by the "nine old men" and the basis of their own personal beliefs and opinions. Nothing could be further from the fact. The Court's power is only negative, never positive; it cannot and does not legislate. It makes no statutes; it levies no taxes; it does nothing except uphold the lawful and negate the unlawful. As for the assertion that the Court's decisions represent merely the personal ideas of its members, no better answer can be given than the known fact that men who were so-called "liberals" when nominated have written so-called "conservative" opinions, and members known as "conservatives" when nominated, like the present Chief Justice, have consistently been on the "liberal" side.

I do not propose to argue the merits of various statutes of a primarily social or economic nature passed by Congress but declared unconstitutional by the Court, such as the NRA. It should be sufficient for me to state here that I do not for one moment deny the probable necessity of certain economic and sociological reforms under pres-

Con continued on page 317

Lewis, *Cont'd*

interest it is to have such power over the legislative and executive assert it for their own ends. The wonder is that it has ever been acquiesced in at all under a free form of government.

Let us not forget that the Republic grew and prospered without the nullifying of the acts of the Congress from 1789 to 1857.—*Extracts, see 5, p. 320.*

▼

by the late Robert M. LaFollette, Sr.

U. S. Senator, Wisconsin

★ *The elder Senator LaFollette urged the amendment of the Constitution to provide that no inferior Federal Court be permitted to pass on the constitutionality of an Act of Congress and that if the Supreme Court declared an Act unconstitutional Congress could nullify that decision by re-passing the Act.*

WE have never faced the fundamental issue of Judicial Usurpation squarely.

It would require a dozen constitutional amendments to correct the evils of the decisions which the court has handed down within the past three or four years.

The time has come when we must put the axe to the root of this monstrous growth upon the body of our government. The usurped power of the Federal courts must be taken away and the Federal judges must be made responsive to the popular will.

The question is, which is supreme, the will of the people or the will of the few men who have been appointed to life positions on the Federal bench?

The power which the court now exercises to declare statutes of Congress unconstitutional is a usurped power without warrant in the Constitution, and it is absolutely certain the Constitution would never have been adopted had the men at that time believed that the court they were providing for would assume the powers now exercised by our Federal judges.

I would amend the Constitution so as to provide—(1) That no inferior Federal judge shall set aside a law of Congress on the ground that it is unconstitutional; (2) That if the Supreme Court assumes to decide any law of Congress unconstitutional, or by interpretation undertakes to assert a public policy at variance with the statutory declaration of Congress, which alone under our system is authorized to determine the public policies of government, Congress may, by repassing the law, nullify the action of the court.

Thereafter the law would remain in full force and effect precisely the same as though the court had never held it to be unconstitutional.

The Constitution gave to the President of the United States a veto upon legislation, in order that the Executive might be able to protect itself against encroachments. But it also gave to the Congress the power to assert its will by repassing the law even after it had been vetoed. This was necessary in order to prevent the President from using his veto to block all progress and make himself a despot.

The Constitution did not give the courts a veto, but repeatedly refused to permit them even to participate in the exercise of the Presidential veto power. Nevertheless, the courts have asserted not a veto power while laws were in the making, but have usurped the far greater power to nullify laws after they have been enacted and by the process of so called interpretation to declare the public policy.

We are confronted with a situation wherein we must make a choice that will determine the destiny of this nation in all the generations to come. This choice is simple, but fateful. Shall the people rule through their elected representatives or shall they be ruled by a judicial oligarchy? Shall we move forward in our development as a nation, carrying out the will of the people as expressed by their ballots or shall all progress be checked by the arbitrary dictates of five judges until the situation becomes so desperate that it can no longer be endured?

The American nation was founded upon the immortal principle that the will of the people shall be the law of the land. The courts have forgotten this, but the people have not.—*Extracts, see 1, p. 320.*

▼

by Morris R. Cohen,

Professor of Philosophy, University, City of N. Y.

★ *Professor Cohen argued that the American people have displayed more resentment against small judicial majorities than against large legislative majorities and that the argument that the Supreme Court has authority to declare Congressional Acts unconstitutional is untenable.*

THAT the people of the United States favor the NRA was made obvious by the unprecedented Congressional majority accorded to the Administration in the election of 1934. What, then, prevents Congress from passing a bill enlarging the Supreme Court with ten additional judges who, on a rehearing, are sure to vote for the constitutionality of the original act?

There is a general impression that this would be dishonest. Why so? Because, according to the traditional assumption, judges have nothing to do with making the law, their decisions following with logical necessity from "the solemn will of the people expressed in the Constitution," and if the results are bad, we should go through the laborious ordeal of changing the Constitution rather than the composition of the court. This view has so often been repeated that it is generally accepted as axiomatic. Nevertheless, it rests on a number of rather obvious fallacies.

1. That the judges merely find the meaning of the Constitution and in no way make or mold it has long been

Pro continued on page 318

Gavagan, *Cont'd*

ent conditions in this country. But under the Constitution, unless one is willing to pervert plain English, the power does not exist in the Congress to create many of the lately proposed reforms. No better example could be cited than the NRA which, for the moment, I shall assume to be a universally desired statute. But the answer to the existing lack of power in Congress to so legislate is not to cut off the power of the Court to protect the people, but to increase the power of Congress to benefit them. And the way to increase that power in Congress is clearly set forth in the Constitution itself, Article V, by amendment. The United States Constitution very possibly is not an up-to-date document and does not give to Congress the powers which may be necessary to meet modern needs. But that does not mean that the Court should be obliged to pervert its language, to rewrite the Constitution of its own notion, or to interpret that document in a so-called "flexible" manner, to meet such needs.

If the Constitution does not meet modern needs, let it be amended. When one asks for an amendment to the Constitution, one is immediately met by the argument on the part of those whose social concerns are exceeded only by their haste and ill consideration that the process of amendment is too slow. One needs only to cite the last amendment to the Constitution to refute such a contention. The twentieth amendment, repealing prohibition, was introduced in Congress on February 20, 1933, and was ratified on December 5, 1933. Seven months had elapsed. If necessary, I do not doubt that the process could be speeded up to 3 or 4 months. What more speedy process for creating social reforms could be asked for than one that permits the alteration of the fundamental law upon which this country operates within a period of a few months? But the opponents of the Court do not advocate amendments giving Congress the powers needed; rather, they prefer to curtail the power of the Court. Why so? Because curtailing the power of the Court would not give to Congress merely the additional power needed and which the country might wish the Congress to have but it would give to Congress omnipotent power so that Congress might, at the dictation of one political party or one political leader, commit the catalog of acts above set forth. What a paradox would be created—that a Congress acting under the United States Constitution could do anything under the sun in violation of that very same Constitution!

These so-called "liberals" who advocate the overthrow of the Court are, whether purposely or unconsciously, advocating the very antithesis of true liberal principles and attempting to pave the way for the overthrow of the American system and the establishment of a system that would put us on the same low plane on which the nations of Europe now find themselves.

Mr. Sisson appears to find so much virtue in the English parliamentary system that I can do no better, in closing, than to quote the opinions of Lord Brougham, who said:

"The power of the judiciary to prevent either the State legislature or Congress from overstepping the limits of the Constitution is the greatest refinement in social quality to which any set of circumstances has ever given rise or to which any age has ever given birth."

And of Gladstone, who stated:

"* * * the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."—*Extracts, see 10, p. 320.*

by Charles A. Beard,

Noted Historian

★ *Dr. Beard's discussion, confined exclusively to the intent of the framers of the Constitution, concludes that Chief Justice Marshall in the Marbury vs. Madison decision reflected correctly the views of the leaders of the Constitutional Convention as to the power of the Supreme Court.*

It was a truly remarkable assembly of men that gathered in Philadelphia on May 14, 1787, to undertake the work of constructing the American system of government. It is not merely patriotic pride that compels one to assert that never in the history of assemblies has there been a convention of men richer in political experience and in practical knowledge, or endowed with a profounder insight into the springs of human action and the intimate essence of government. It is indeed an astounding fact that at one time so many men skilled in statecraft could be found on the very frontiers of civilization among a population numbering about four million whites. It is no less a cause for admiration that their instrument of government should have survived the trials and crises of a century that saw the wreck of more than a score of paper constitutions.

All the members had had a practical training in politics. Washington, as commander-in-chief of the revolutionary forces, had learned well the lessons and problems of war, and mastered successfully the no less difficult problems of administration. The two Morrises had distinguished themselves in grappling with financial questions as trying and perplexing as any which statesmen had ever been compelled to face. Seven of the delegates had gained political wisdom as governors of their native states; and no less than twenty-eight had served in Congress either during the Revolution or under the Articles of Confederation. There were men trained in the law, versed in finance, skilled in administration, and learned in the political philosophy of their own and all earlier times. Moreover, they were men destined to continue public service under the government which they had met to construct—Presidents, Vice-Presidents, heads of departments, justices of the Supreme Court were in that imposing body. They were equal to the great task of constructing a national system strong enough to defend the country on land and sea, pay every dollar of the lawful debt, and afford sufficient guarantees to the rights of private property.

As Woodrow Wilson has concisely put it, the framers of the Constitution represented "a strong and intelligent

Con continued on page 319

Cohen, *Cont'd*

characterized among scientific jurists as a childish fiction. No one can seriously maintain that all of our constitutional law as to what constitutes interstate commerce, the police power of the states, or due process of law follows logically from the wording of the Constitution and has not been affected by the social, economic, and political opinions of different judges. The law took a different direction under Taney than under Marshall. Indeed, how could the people in 1789—or the small proportion of them who had the right to vote then—have foreseen all the modern inventions and made definite provisions for them? It is certainly not through anything written in the Constitution that the power to regulate interstate commerce includes the power to prohibit the sending of liquor into certain states but not the power to regulate insurance. A thousand similar distinctions may be mentioned which, whether justified or not by their practical consequences, are certainly judge-made and might have been different if other judges had ruled.

Specifically the NRA is declared unconstitutional because it delegates legislative power to the President. But the fact is that all effective legislation for the future must inevitably delegate some subsidiary lawmaking to the executive authority. Justices Stone and Cardozo recognized this and claimed that in this case there was too much delegation. But the line between proper and improper delegation is not laid down in the Constitution itself. Where to draw it is a question of political wisdom. Why should the courts rather than Congress determine it? The usual answer is that the Constitution declares itself to be the supreme law of the land, and its interpretation must therefore be left to the courts. This, however, cannot be consistently maintained. The Constitution provides that every state shall be guaranteed a republican form of government. What does that mean? In the Oregon case, when the issue was raised as to whether the referendum was comparable with a republican form of government, the Supreme Court declared it a political question and *not* for the courts to decide. There are in fact many express provisions of the Constitution which the courts cannot or dare not enforce. Thus for more than ten years Congress refused to obey the Constitution and to apportion representation according to the latest census. Would our courts have dared to declare the acts of the counter-constitutional congresses between 1922 and 1932 unconstitutional? Certainly not, though if they did so, they would be on logically firmer ground than in deciding that Congress could not pass a minimum-wage law for the District of Columbia.

The truth, then, is that constitutional law is just what judges make it. A leading conservative newspaper put it aptly when it said that the United States Supreme Court is a continuous constitutional convention. This it is in fact. But we do not generally recognize it, else we should demand that the work of this constitutional convention be ratified by the people before it goes into effect, or at any rate that the delegates be more responsive to, and in closer touch with, popular needs.

2. We are frequently told that the Constitution represents the eternal principles of justice, or at least those principles of liberty and right which are characteristic of Anglo-Saxon civilization. The first of these claims is obviously question-begging; specific decisions which strike people as unjust can certainly not be defended that way. The second claim is even more readily disposed of by the fact that our English cousins have never given their courts power to set aside legislation on grounds of unconstitutionality.

3. Quite fallacious also is the rhetorical argument that without this power vested in the courts we should be at mercy of legislative majorities. This argument ignores the historic fact that in few, if any, actual cases have the majority of our people felt themselves saved from Congressional oppression by judicial intervention. On the contrary, Congress being more responsive to popular demand, our people as a whole have felt more resentment at being at the mercy of small judicial majorities than at being at the mercy of very large legislative majorities. Besides, the mischief of Congressional wrongs can be readily remedied at the next election, while the mischief of wrong judicial decisions in the name of the Constitution requires the laborious consent of two-thirds of each house of Congress and three-quarters of the state legislatures.

If we need watchers to protect us from bad legislation, why not watchers against bad judicial decisions? The fact is that the people of England, France, Switzerland, or the Scandinavian countries feel as free as we do, and their rights are as amply protected, without their courts having the power to set aside legislation as unconstitutional.

4. It is quite fallacious to urgue that our system assures a maximum security of legal rights and thus encourages business enterprise. The actuality is rather the other way. In no other civilized country would people endure a legal system in which such a question as that of the legality of certain codes could remain undetermined for two years. In no other country also is there such a complete separation between power and responsibility as in ours, where those who have the final word on all questions of law are in no way answerable to the popular will or to any other earthly authority.

5. It is generally urged that the judicial veto over legislation has been in force since the case of Marbury vs. Madison in 1803 and it is too late to change it. This argument is historically untenable. What that famous case did decide was that the court would not issue a mandamus to compel a Democratic Secretary of State to deliver certain commissions to some Federalists, even though an act of Congress authorized it to do so. The actual decision was a quite satisfactory victory for the Democratic Administration and not something over which the country got excited. In his written opinion Marshall did, in the fashion of his day, indulge in speculations about constitutions written for all time and superior to acts of Congress; but most of it was mere dictum. It is obviously one thing for a court to refuse to follow a coordinate department of the government to constrain the Executive, and quite another to say to the people at large that they are under no obligation to obey a general law enacted by Congress. Marshall argued that judges swear to obey the Constitution and must therefore live up to their oath. But Members of Congress and the Executive likewise swear to obey the Constitution and must therefore also follow what they regard as the meaning of the Constitution. From the

Pro continued on page 320

Beard, *Cont'd*

class composed of unity and informed by a conscious solidarity of interests." They were not convened to write a Declaration of Independence, but to frame a government which would meet the practical issues that had arisen under the Articles of Confederation. The objections they entertained to direct popular government, and they were undoubtedly many, were based upon their experience with popular assemblies during the immediately preceding wars. With many of the plain lessons of history before them, they naturally feared that the rights and privileges of the minority would be insecure if the principal of majority rule was definitely adopted and provisions made for its exercise.

Indeed, every page of the laconic record of the proceedings of the convention preserved to posterity by Mr. Madison shows conclusively that the members of that assembly were not seeking to realize any fine notions about democracy and equality, but were striving with all the resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on one hand against the possibilities of despotism and on the other against the onslaught of majorities. In the mind of Mr. Gerry, the evils they had experienced flowed "from the excess of democracy," and he confesses that while he was still republican, he "had been taught by experience the danger of the levelling spirit."

Mr. Madison warned the convention that in framing a system which they wished to last for ages they must not lose sight of the changes which the ages would produce in the forms and distribution of property. In advocating a long term in order to give independence and firmness to the Senate, he described these impending changes: "An increase of population will of necessity increase the proportion of those who will labor under all the hardships of life and secretly sigh for a more equal distribution of its blessings. These may in time out-number those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this country, but symptoms of a levelling spirit, as we have understood, have sufficiently appeared, in a certain quarter, to give notice of the future danger." Various projects for setting up class rule by the establishment of property qualifications for voters and officers were advanced in the convention, but they were defeated.

Nevertheless, by the system of checks and balances placed in the government, the convention safeguarded the interests of property against attacks by majorities. The House of Representatives, Mr. Hamilton pointed out, "was so formed as to render it particularly the guardian of the poorer orders of citizens," while the Senate was to preserve the rights of property and the interests of the minority against the demands of the majority. In the tenth number of *The Federalist*, Mr. Madison argued in a philosophic vein in support of the proposition that it was necessary to base the political system on the actual conditions of "natural inequality." Uniformity of interests throughout the state, he contended, was impossible on account of the diversity in the faculties of men, from which the rights of property originated; the protection of these faculties was the first object of government; the unequal distribution of wealth inevitably led to a clash of interests in which the majority was liable to carry out its policies at the expense of the minority; hence, he added in concluding this splendid piece of logic "the majority, having such coexistant passion or interest, must be rendered by their number and local situation unable to concert and carry into effect schemes of oppression"; and in his opinion it was the great merit of the newly framed Constitution that it secured the rights of the minority against "the superior force of an interested and overbearing majority."

This very system of checks and balances, which is undeniably the essential element of the Constitution, is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property. The exclusion of the direct popular vote in the election of the president; the creation, again by indirect election, of a Senate which the framers hoped would represent the wealth and conservative intereats of the country; and the establishment of an independent judiciary appointed by the President with the concurrence of the Senate—all these devices bear witness to the fact that the underlying purpose of the Constitution was not the establishment of popular government by means of parliamentary majorities.

It is in the light of the political situation that existed in 1787 that we must inquire whether the principle of judicial control is out of harmony with the general purpose of the federal Constitution. It is an ancient and honorable rule of construction, laid down by Blackstone, that any instrument should be interpreted, "by considering the reason and spirit of it; or the cause which moved the legislator to enact it. . . . From this method of interpreting laws, by the reason of them, arises what we call equity." It may be, therefore, that issue of judicial control is a case in equity. The direct intention of the framers and enactors not being clearly expressed on this point, we may have recourse to the "reason and spirit" of the Constitution.

The great Justice (Marshall) who made the theory of judicial control operative had better opportunities than any student of history or law today to discover the intention of the framers of the Federal Constitution. Marshall, to be sure, did not have before him Elliot's Debates, but he was of the generation that made the Constitution. He had been a soldier in the Revolutionary War. He had been a member of the Virginia convention that ratified the Constitution; and he must have remembered stating in that convention the doctrine of judicial control, apparently without arousing any protest. He was on intimate, if not always friendly, relations with the great men of his state who were instrumental in framing the Constitution. Washington once offered him the Attorney-generalship. He was an envoy to France with two members of the convention, Charles Cotesworth Pinckney and Elbridge Gerry. He was a member of Congress for part of one term in Adams' administration; he was Secretary of State under Adams.

It was, therefore, no closet philosopher, ignorant of the conditions under which the Constitution was established and unlearned in the reason and spirit of that instrument

Pro continued on page 320

Cohen, *Cont'd*

chaos which would follow a consistent adherence to the theory of three independent departments of the government we have been saved by the process of practical accommodation and the extra-legal party system.

The first case in which the Supreme Court exercised the right to set aside a law of general importance was the Dred Scott case, and the decision and the dicta in that case were repealed by force of arms. It is only in recent times that declaring acts of Congress unconstitutional may be said to have become a practice.

6. The subordination of Congress to the courts has often been defended on the ground that under this system we have greatly prospered. This is a rather naive example of the fallacy of *post hoc ergo propter hoc*. Our prosperity, if it is a fact, may be due to our unrivaled natural resources, to the practical skill of our people, and the like. And it may well be argued that our present depression is in part due to such judicial vetoes as those of the Lochner case, the Adair case, the child-labor cases, the minimum-wage cases, and others, which by depressing the economic power of the laboring classes have depressed our home markets.

7. When we realize that the important questions which come before our highest court involve political, economic, and technical issues, then if we lay aside pious rhetoric we must admit that far from being the strongest, the judiciary is the weakest part of our governmental system—for it has the least opportunity of getting adequate information. No one who wants to inform himself thoroughly on any question will be satisfied to do so on the basis of listening for a few hours to two lawyers who have submitted argumentative briefs.

8. Space does not permit discussion of the relation of our federal courts to state legislation. But if the virtue of a federal system be the opportunity for different experiments in different states, that virtue has been effectively minimized by the way in which the Supreme Court has turned the Fourteenth Amendment—intended by the people as a protection for the Negroes—into a prohibition of experiments in the field of social legislation.—*Extracts, see 9, p. 320.*

Beard, *Cont'd*

who first enunciated from the supreme bench in unmistakable language the doctrine that judicial control over legislation was implied in the provisions of the Federal Constitution.

Those who hold that the framers of the Constitution did not intend to establish judicial control over federal legislation sometimes assert that Marshall made the doctrine out of whole cloth and had no precedents or authority to guide him. This is misleading. It is true that it was Marshall who first formally declared an act of Congress unconstitutional; but the fact should not be overlooked that in the case of Hylton v. the United States, 1796, the Supreme Court, with Ellsworth as Chief Justice and Paterson as Associate Justice (both members of the convention), exercised the right to pass upon the constitutionality of an act of Congress imposing a duty on carriages. On behalf of the appellant in this case it was argued that the law was unconstitutional and void in so far as it imposed a direct tax without apportionment among the states. The Court sustained the statute. If it was not understood that the Court had the power to hold acts of Congress void on constitutional grounds, why was the case carried before it? If the Court believed that it did not have the power to declare the act void as well as the power to sustain it, why did it assume jurisdiction at all or take the trouble to consider and render an opinion on the constitutionality of the tax?

The doctrine of judicial control was a familiar one in legal circles throughout the period between the formation of the Constitution and the year 1803, when Marshall decided the Marbury case.

In view of the principles entertained by the leading members of the convention with whom Marshall was acquainted, in view of the doctrine so clearly laid down in Number 78 of The Federalist, in view of the arguments made more than once by eminent counsel before the Supreme Court, in view of the judicial opinions several times expressed, in view of the purpose and spirit of the Federal Constitution, it is difficult to understand the temerity of those who speak of the power asserted by Marshall in Marbury v. Madison as "usurpation."—*Extracts, see 8, p. 320.*

Sources of Material in This Issue

1—(Willoughby) *The Supreme Court of the United States.*
2—(Hughes) *The Supreme Court of the United States—an Interpretation.*
3—(Ramsay) *Congressional Record,* July 12, 1935.
4—(Sisson) *Address,* University of Virginia Institute of Public Affairs, July 10, 1935.
5—(Lewis) *Congressional Record,* Sept. 10, 1935.
6—(Christianson) *Address,* Worcester, Mass., June 22, 1935.
7—(Vandenberg) *Radio Address,* June 20, 1935.
8—(Beard) *The Supreme Court and the Constitution.*
9—(Cohen) *The Nation,* July 10, 1935.
10—(Gavagan) *Congressional Record,* August 13, 1935.
11—(La Follette) *Address,* A. F. of L. Convention, Cincinnati, Ohio, June 14, 1922.
12—(Hester) *The Washington Star,* July 21, 1935.

PRO AND CON FEATURES

covered by

THE CONGRESSIONAL DIGEST

During the Roosevelt Administration, 1933 - 1935

1933

April .....The Banking Problem
May .....Tariff Reciprocity
June .....Suspension of Anti-Trust Laws
Sept. .....Radio Control (debate topic)
Oct. .....Recognition of Soviet Russia
Nov. .....Increasing Powers of the President
Dec. .....N.I.R.A. and the Supreme Court

1934

Jan. .....The President's Gold Policy
Feb. .....Emergency Aid to Schools
March .....New Food and Drug Control
April .....Natural Defense
May .....New Federal Security Legislation
June .....Congress and the New Deal
Sept. .....Regular Grants to Schools (debate topic)
Oct. .....Government Ownership of Power Utilities
Nov. .....Investigation of Munitions Industries
Dec. .....The Crop Control Experiment (A.A.A.)

1935

Jan. .....The New Congress and the New Deal
Feb. .....Compulsory Unemployment Insurance
March .....Old Age Pensions
April .....Labors Program
May .....Abolition of Utility Holding Companies
June .....Anti-Lynching Legislation
Sept. .....State Medicine (special debate topic)
Oct. .....Federal Seditions Legislation
Nov. .....Deportation of Aliens
Dec. .....Congress and the Supreme Court

In Every Number of

THE CONGRESSIONAL DIGEST

Published without Editorial Bias or Advertising

THE HISTORICAL FACTS—POLITICS—CURRENT ARGUMENTS
SURROUNDING THE PROBLEMS OF THE MONTH IN CONGRESS.
ONE DISCUSSION COMPLETE IN EACH NUMBER, REVEALING THE WHOLE STORY.

PUBLISHED THE FIRST OF EVERY MONTH EXCEPT JULY AND AUGUST

CONGRESSIONAL DIGEST,
2131 LeRoy Place, Washington, D. C.

Please enter .....subscription for .....years

☐ Enclosed find $ ..... in payment. ☐ Send bill.

Name .....

Address .....

City .....State .....

RATES: *Yearly subscriptions: Single*, U. S. $5 (1 yr.) $9 (2 yrs.); $12 (3 yrs.). *Plural*, 2 to 20, $4. 20 and up $3. *Single copies:* 50c ea.; 10 at 40c ea.; 25 at 35c ea.; 50 at 25c ea.; 100 at 20c ea. *Back Nos.* 75c up.

NEXT MONTH

A Thorough Discussion of American Neutrality

Congress Faces Decision on a Permanent Policy

Politics in the Coming Session

What Will Congress Do on the Eve of the Presidential Campaign?

THE CONGRESSIONAL DIGEST

Washington, D. C.

$5 a yr. Single Copy, 50c—10 @ 40c ea.—25 @ 35c ea.—50 @ 25c ea.—100 @ 20c ea.